

***United States Court of Appeals  
for the Second Circuit***



**JOINT APPENDIX**





ORIGINAL

76-7153

United States Court of Appeals

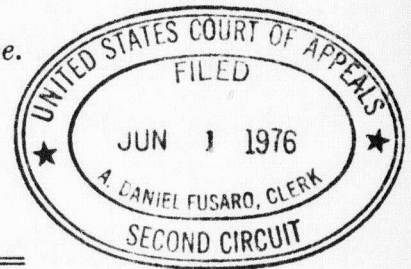
For the Second Circuit.

REBOUND SYSTEMS, INC.,  
*Plaintiff-Appellant,*

*against*

MATCHPOINT INDUSTRIES, INC.,  
*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK.



APPENDIX.

WEISMAN, CELLER, SPETT, MODLIN, WERTHEIMER  
& SCHLESINGER

*Attorneys for Plaintiff-Appellant*

425 Park Avenue  
New York, N. Y. 10022

JACK A. KANZ

*Attorney for Defendant-Appellee*

1423 Davis Building  
Dallas, Texas 75202

PAGINATION AS IN ORIGINAL COPY



# INDEX TO APPENDIX.

	Page
Docket Entries . . . . .	1a
Complaint . . . . .	3a
Notice of Motion to Dismiss Under F.R.C.P. 12(b) (2) and (3), or to Transfer Under 28 U.S.C. 1406 or 1404(a) . . . . .	15a
Affidavit of John D. Helms in Support of Motion .	18a
Affidavit of David H. Kennington in Support of Motion . . . . .	22a
Exhibit 1, Annexed to Memorandum in Support of Defendant's Motion . . . . .	26a
Exhibit 2, Annexed to Memorandum in Support of Defendant's Motion . . . . .	27a
Exhibit 3, Annexed to Memorandum in Support of Defendant's Motion . . . . .	28a
Exhibit 4, Annexed to Memorandum in Support of Defendant's Motion . . . . .	30a
Exhibit 5, Annexed to Memorandum in Support of Defendant's Motion . . . . .	31a
Exhibit 6, Annexed to Memorandum in Support of Defendant's Motion . . . . .	34a
Exhibit 7, Annexed to Memorandum in Support of Defendant's Motion . . . . .	39a
Appendix A, Annexed to Supplemental Memorandum in Support of Defendant's Motion . . . . .	40a

ii.

	Page
Affidavit of Jay Monroe in Opposition to Motion .	49a
Affidavit of Robert B. Dubner in Opposition to	
Motion . . . . .	57a
Exhibit 1, Annexed to Affidavit of Robert B.	
Dubner . . . . .	65a
Exhibit 2, Annexed to Affidavit of Robert B.	
Dubner . . . . .	66a
Affidavit of Bernard J. Jacobson in Opposition	
to Motion . . . . .	67a
Exhibits A and C, Annexed to Affidavit of	
Bernard J. Jacobson . . . . .	72a
Exhibit B, Annexed to Affidavit of Bernard J.	
Jacobson . . . . .	73a
Excerpts From Transcript of Testimony . . . . .	74a
David H. Kennington, for Plaintiff, Direct .	76a
Opinion and Order . . . . .	119a



1a

UNITED STATES COURT OF APPEALS,  
FOR THE SECOND CIRCUIT.

-----X

REBOUND SYSTEMS, INC.,

*Plaintiff-Appellant,*

*-against-*

MATCHPOINT INDUSTRIES, INC.,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

-----X

DOCKET ENTRIES.

Date	Proceedings
1975	
5-15	Filed complaint and issued summons.
5-29	Filed Summons with Marshal's Return.. Served Secy of State of NY by James Casuscelli, 5/22/75.
6-05	Filed Affdvt of Service of Process on Authorized Foreign Corporation by Edward F. Levy by regis- tered mail on 6/2/75;
7-02	Reassigned from JUDGE POLLACK to JUDGE GRIESA
10-24	Filed defts affdvt & notice of motion to dismiss the complt pursuant to Rule 12(b). Ret. 11-7-75.
10-24	Filed defts memo in support of motion to dismiss or transfer.

## DOCKET ENTRIES

Date	Proceedings
1975	
10-24	Filed defts supplemental memo in support of motion to dismiss or transfer.
10-24	PRE-TRIAL CONFERENCE HELD BY J. GRIESA
11-7	Filed pltffs affidvts & affdvt in opposition to defts motion to dismiss or transfer.
11-7	Filed pltffs memo in opposition to defts motion to dismiss or transfer.
11-11	Filed reply memorandum to pltffs memo in opposition to defts motion to dismiss or transfer.
1976	
2-26	Filed Opinion #43944--for the reasons stated, the action is dismissed for lack of personal jurisdiction. So ordered- GRIESA, J. (m/n)
3-25	Filed pltff's notice of appearance by Weisman, Celler, Spett, Modlin, Wertheimer & Schlesinger.
3-25	Filed undertaking for costs on appeal in the sum of \$250, 00-- United States Fidelity and Guaranty Co.
3-25	Filed pltff's notice of appeal to USCA from the order entered on 02-26-76, Cop to: Amster & Rothstein. Ent. 03-26-76



## COMPLAINT.

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- X	:	
REBOUND SYSTEMS, INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No.
MATCHPOINT INDUSTRIES, INC.,	:	
Defendant.	:	
----- X	:	

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff brings this action against the defendant  
and alleges as follows:

FIRST CAUSE OF ACTION

1. Plaintiff Rebound Systems, Inc. is a New York corporation having a place of business at 1129 Northern Boulevard, Manhasset, New York 11030.

2. Defendant Matchpoint Industries, Inc. is a Texas corporation having its principal place of business at 13,547 Rawhide, Dallas, Texas.



## COMPLAINT

3. This cause of action is for Declaratory Judgment under Title 28, U.S.C., Section 2201 in reference to United States Letters Patent. Jurisdiction of this Court is also predicated upon Title 28, U.S.C., Section 1338 and the patent laws of United States, Title 35 of the United States Code.

4. Plaintiff is, and previously has been engaged in the business of making, or having made, and selling in interstate commerce, a pressurizing pump attachment for tennis ball cans which is operable to increase the internal pressure within the can.

5. Defendant similarly is, and previously has been engaged in the business of making, or having made, and selling, or having sold in interstate commerce, a pressurizing pump attachment for tennis ball cans, which attachments of defendant have been and now are sold within the Southern District of New York.

6. On information and belief, defendant is the record owner of United States Letters Patent No. 3,853,222 issued on December 10, 1944, in the name of John D. Helms, for an alleged invention in PRESSURIZATION APPARATUS, by virtue of a purported instrument of assignment by the alleged inventor John D. Helms.

## COMPLAINT

7. Even before said Patent No. 3,853,222 was granted, defendant claimed, and does now claim, that the pressurization pump attachments manufactured and sold by plaintiff, or manufactured and sold under the control and direction of plaintiff, infringe said Patent No. 3,853,222, and plaintiff has denied and does now deny said charge of infringement and has asserted and does assert that it has the right to manufacture, or have manufactured for it, and sell such pressurization pump attachments unhampered and unmolested by subject patent and by charges of infringement thereof by defendant.

8. Defendant, through its representatives, has orally and by writing charged plaintiff with infringement of subject Patent No. 3,853,222, and has orally threatened plaintiff with suit based upon infringement of subject Patent, such threats of infringement litigation having been made in the Southern District of New York.

9. Upon information and belief, defendant, through its representatives, has informed a prospective distributor of plaintiff in Brooklyn, New York of the imminence of grant and of the actual grant of its Patent No. 3,853,222 and of its alleged rights thereunder, and has alleged infringement by



## COMPLAINT

plaintiff and by plaintiff's prospective distributor, and threatened litigation with respect to said Patent, as well as disparaging plaintiff's product and good will.

10. Upon information and belief, the defendant is well aware that plaintiff has not committed any acts of infringement with respect to subject Patent and that any claims of its Patent which could be asserted against plaintiff are invalid and void, and is attempting to unlawfully and illegally capitalize on this patent pursuant to a concerted effort, plan and campaign of intimidation and misrepresentation which, if permitted to continue, will result in irreparable damage and harm to the plaintiff.

11. On information and belief, defendant does business within this District within the purview of Title 28, U.S.C., Section 1391(c) and/or transacts business within the State of New York within the purview of New York "long arm" statute CPLR, Sections 301 and 302.

12. Plaintiff specifically denies infringement with respect to said Letters Patent No. 3,853,222, and states that the claims of said Letters Patent, when given the scope asserted for them by defendant, are broader than the alleged invention

## COMPLAINT

described in the Patent, and defendant is not entitled to assert such a scope for said claims as to cover pressurizing pump attachments distributed by plaintiff or distributed under plaintiff's control and direction.

13. Upon information and belief, said Letters Patent No. 3,853,222 is wholly invalid and void and unenforceable, and should not have been granted because:

(a) John D. Helms, the alleged inventor and patentee of said Patent No. 3,853,222 was not the original, first and sole inventor of the alleged improvements claimed by him in said patent, but that the same things were in all material and essential features, and previous to the alleged invention by the said John D. Helms and more than one year before the date of his application for said Patent, fully described and set forth in certain Letters Patent and publications of which defendant will be given due and timely notice prior to the Trial of this action;

(b) More than one year prior to the filing of the application for the subject Patent No. 3,853,222, the alleged invention thereof was in public use within the United States;



## COMPLAINT

(c) Before the applicant's alleged invention thereof, the invention purported to be patented thereby was made in this country by another who had not abandoned, suppressed or concealed it;

(d) The alleged invention purporting to be patented in and by said Letters Patent did not constitute patentable invention within the meaning of the Patent Laws, in view of the prior state of the art;

(e) The difference between the subject matter purported to be patented thereby and the prior state of the art is such that the subject matter as a whole would have been obvious at the time the alleged invention was made to a person having ordinary skill in the art to which said subject matter pertains;

(f) The specification of said Patent does not contain a written description or drawing of the invention and of the manner and process of making and using the same in such full, clear, concise and exact terms as to enable any person skilled in the art to which it pertains or with which it is most nearly connected to make or use the same, nor does it set forth the best mode contemplated by the inventor of carrying out his alleged invention;

## COMPLAINT

(g) The claims annexed to the specification of said Patent do not particularly point out or distinctly claim the subject matter of the alleged invention.

14. Defendant is estopped by the proceedings in the United States Patent Office in the matter of the application for said Letters Patent No. 3,853,222 and by its acquiescence in and to the rulings and rejections of the Commissioner of Patents in negotiations for said Letters Patent, and in and by the limitations imposed thereby during the prosecution thereof in the Patent Office leading up to the grant of said Letters Patent, from asserting any such scope of invention or subject matter for said alleged Letters Patent, or any of the claims thereof, as comprehends or embraces the pressurization pump attachments claimed by defendant to be manufactured or sold by plaintiff in infringement of said Letters Patent.

15. By reason of the facts and circumstances hereinabove outlined in detail, there is an actual controversy between plaintiff and defendant which is not only substantial but also adverse in character.



## COMPLAINT

16. Plaintiff's interest is sufficient to justify a judicial determination of defendant's assertion of infringement, defendant having the power to seriously prejudice plaintiff's rights, all to plaintiff's irreparable damage.

SECOND CAUSE OF ACTION

17. Plaintiff repeats the allegations of Paragraphs 1, 2 and 4 through 16 hereof with the same force and effect as if separately alleged herein.

18. Jurisdiction of this second cause of action is predicated upon 28 U.S.C. 1338(b) and by virtue of diversity in citizenship, the matter in controversy exceeding the sum of or value of TEN THOUSAND (\$10,000) DOLLARS, exclusive of interest and costs.

19. Plaintiff and defendant have been and are competitors in the manufacture and sale or distribution of pressurizing pump attachments for tennis ball cans in the State of New York as well as in interstate commerce in the United States.

## COMPLAINT

20. Prior to December 10, 1974, the date of issuance of Letters Patent No. 3,853,222, plaintiff had arranged with Tensor Corporation, of Brooklyn, New York, to become the exclusive distributor to the sporting goods trade of plaintiff's pressurizing pump attachments. Considerable sums were spent by plaintiff for printing and packaging featuring the name of Tensor Corporation, and by Tensor Corporation in advertising the product.

21. Prior to the date of issuance of Letters Patent No. 3,853,222, defendant sent letters to both plaintiff and the Tensor Corporation, stating that defendant had filed a patent application covering the pressurizing pump attachment it was manufacturing, and that this pending patent application would soon issue with allowed claims, copies of which were enclosed with the letter. The letters also intimated that plaintiff's pump attachments may infringe the claims submitted.

22. Plaintiff, through its attorneys, answered the aforesaid letters of defendant, calling attention to certain prior patents which disclosed the alleged novel and essential subject matter of the allegedly allowed claims of defendant's patent application, which prior patents were considered to



## COMPLAINT

render such allowed claims invalid if issued, and also advising that plaintiff's pressurizing pump attachment did not incorporate the structural features defined in the claims of the patent application and therefore would not constitute an infringement thereof.

23. Upon information and belief, subsequent to the issuance of Letters Patent No. 3,853,222, defendant, with knowledge that the pressurizing pump attachments of plaintiff do not infringe subject patent, and that said patent is invalid and void, nevertheless, through its representative, visited the offices of Tensor Corporation in Brooklyn, New York, advised Tensor Corporation of the grant of subject Patent, and charged Tensor Corporation and plaintiff with infringement of its Patent, threatening litigation with respect to said Patent. Defendant also suggested that Tensor Corporation cease its activities as distributor for plaintiff and become a distributor for defendant.

24. As a result of the charge of infringement and threat of litigation made by defendant, Tensor Corporation terminated its distribution activities on behalf of plaintiff, resulting in irreparable damage and harm to plaintiff.

## COMPLAINT

25. Upon information and belief, defendant with knowledge of existing or proposed contractual and business arrangements and obligations between plaintiff and its distributors and customers or possible customers, has embarked upon a campaign and course of action to intimidate plaintiff and its distributors and customers and to compete unfairly with plaintiff by inducing or attempting to induce plaintiff's distributors and customers to terminate their existing or proposed arrangements and agreements with plaintiff, under the guise of alleged patent infringement with respect to subject Patent, which if permitted to continue will result in irreparable damage and harm to plaintiff in the future as it has in the past and will give defendant a monopoly in the manufacture and sale of pressurizing pump attachments, thus depriving the plaintiff from continuing in a business which involves violation of no legal right of defendant.

WHEREFORE, plaintiff prays for a judgment and decree of this Court providing as follows:

(a) That said Patent No. 3,853,222 is invalid and void and of no force and effect, and that plaintiff has not been and is not now infringing said Letters Patent No. 3,853,222.



## COMPLAINT

(b) That this Court grant a Preliminary Injunction pending this suit and a Perpetual Injunction enjoining and restraining defendant and its agents and attorneys from further asserting, contending, claiming or alleging that said United States Letters Patent No. 3,853,222, or any claim thereof, has heretofore been or is being infringed by plaintiff, its dealers, distributors or customers and against any further interference with plaintiff's contractual relations and against Unfair Competition.

(c) That this Court grant an accounting of plaintiff's damages owing to defendant's acts with respect to the aforesaid charge of possible or actual infringement of said Patent No. 3,853,222, interference with contractual relations and unfair competition, and that said damages be trebled.

(d) That plaintiff be awarded its attorneys' fees and costs as determined by this Court.

(e) That plaintiff have such other and further relief as may to this Court seem just and proper.

REBOUND SYSTEMS, INC.

By: 

Edward F. Levy  
Attorney for Plaintiff  
Levy & Malina  
41 East 42nd Street  
New York, New York 10017  
(212) 490-0770

NOTICE OF MOTION TO DISMISS UNDER F.R.C.P. 12(b)(2) and  
(3), OR TO TRANSFER UNDER 28 U.S.C. 1406 OR 1404(a).

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
REBOUND SYSTEMS, INC.

Plaintiff,

v.

MATCHPOINT INDUSTRIES

Defendant,  
----- x

Civil Action No.  
75 Civ. 2303 (TPG)

NOTICE OF MOTION AND  
MOTION TO DISMISS UNDER  
F.R.C.P. 12(B)(2) AND  
(3), OR TO TRANSFER UNDER  
28 USC 1406 OR 1404(a)

To: Edward F. Levy, Esq.  
41 East 42nd Street  
New York, New York 10017

PLEASE TAKE NOTICE, that the undersigned will  
move this Court, before the Honorable Thomas P. Griesa, United  
States District Judge, at the Courthouse, Foley Square, New York,  
New York on *November 7, 1975*, or as soon thereafter  
as counsel can be heard, pursuant to Rules 12(b)(2) and (3) of  
the Federal Rules of Civil Procedure, to dismiss Plaintiff's  
Complaint in this action on the grounds: That this Court lack  
jurisdiction over the person of the Defendant and; that venue is  
improperly laid in the Southern District of New York.



NOTICE OF MOTION TO DISMISS UNDER F.R.C.P. 12(b)(2) and  
(3), OR TO TRANSFER UNDER 28 U.S.C. 1406 OR 1404(a)

In the alternative, and if the Court finds that it has jurisdiction over the person of the Defendant, Defendant moves the Court, pursuant to 28 U.S.C. 1406, to transfer this action to the Northern District of Texas on the ground that venue is improperly laid in the Southern District of New York.

Further in the alternative, and if the Court finds both that it has jurisdiction over the person of the Defendant and that venue is properly laid in the Southern District of New York, Defendant moves the Court, pursuant to 28 U.S.C. 1404(a), to transfer this action to the Northern District of Texas on the ground that the convenience of parties and witnesses and the interest of justice would best be served by such a transfer.

The grounds for support of this motion are set forth in detail in the accompanying memorandum and are supported by

NOTICE OF MOTION TO DISMISS UNDER F.R.C.P. 12(b)(2) and  
(3), OR TO TRANSFER UNDER 28 U.S.C. 1406 OR 1404(a)

the Affidavits of John D. Helms, President of Defendant corporation, and of David H. Kennington, Vice-President and Chairman of the Board of Defendant corporation, filed herewith.

Respectfully submitted,

AMSTER & ROTHSTEIN

By 

Jesse Rothstein  
50 East 42nd Street  
New York, New York 10017  
(212) 697-5995

of Counsel:

Jack A. Kanz, Esq.  
1423 Davis Building  
Dallas, Texas 75202  
(214) 742-5413

Jack Gay, Esq.  
2877 LBJ Freeway  
Dallas, Texas  
(214) 241-3393

Attorneys for Defendant



AFFIDAVIT OF JOHN D. HELMS IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

REBOUND SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No.
	)	75 CIV 2303
MATCHPOINT INDUSTRIES, INC.,	)	
	)	
Defendant.	)	

AFFIDAVIT

I, JOHN D. HELMS, being duly sworn and being above the age of 21 years and being fully competent, depose and say that:

1. I reside at 13547 Rawhide, Farmers Branch, Dallas County, Texas.
2. I am President of Matchpoint Industries, Inc. Defendant in the above-styled cause, and am authorized to make this affidavit in behalf of the corporation.
3. I have direct and personal knowledge of the corporation's organization and business activities.
4. Matchpoint Industries, Inc. is a corporation duly organized and existing by virtue of the laws of the State of Texas, and was formed and organized on July 13, 1973.

AFFIDAVIT OF JOHN D. HELMS IN SUPPORT OF MOTION

5. Matchpoint Industries, Inc. maintains its sole place of business at 13547 Rawhide, Farmers Branch, Texas.
6. Matchpoint Industries, Inc. is not incorporated or licensed to do business in the Southern District of New York nor in any district in the State of New York, nor in any state or district outside the State of Texas.
7. Matchpoint Industries, Inc. has no officer, agent or other representative residing outside the State of Texas.
8. All the officers, directors and employees of Matchpoint Industries, Inc. reside in Dallas County, Texas.
9. Matchpoint Industries, Inc. has entered into no contracts with residents or inhabitants of the Southern District of New York nor with any person, firm or corporation outside the State of Texas.
10. Matchpoint Industries, Inc. has never engaged in any business within the Southern District of New York nor in any district in the State of New York nor in any place outside the State of Texas.
11. Matchpoint Industries, Inc. has never entered into any contracts to be performed in the Southern District of New York nor in any district in the State of New York nor in any place outside the State of Texas.



AFFIDAVIT OF JOHN D. HELMS IN SUPPORT OF MOTION

12. Matchpoint Industries, Inc. has caused no goods to be shipped into the Southern District of New York nor in any district in the State of New York nor in any place outside the State of Texas.

13. Matchpoint Industries, Inc. has appointed no agent or representative for service in the Southern District of New York nor in any district in the State of New York nor in any place outside the State of Texas.

14. Matchpoint Industries, Inc. has never maintained an office or place of business in the Southern District of New York nor in any district in the State of New York nor in any place outside the State of Texas.

15. Matchpoint Industries, Inc. has done no act to waive its privilege to be sued in the district of its residence.

16. Matchpoint Industries, Inc. has never done business in the Southern District of New York nor in any district in the State of New York nor in any place outside the State of Texas.

17. I am the inventor of the invention described and claimed in United States Letters Patent No. 3,853,222, which patent was granted on December 10, 1974, and is assigned to Matchpoint Industries, Inc.

18. The sole business activity engaged in by Matchpoint Industries, Inc. is the manufacture through subcontractors located in Dallas

AFFIDAVIT OF JOHN D. HELMS IN SUPPORT OF MOTION

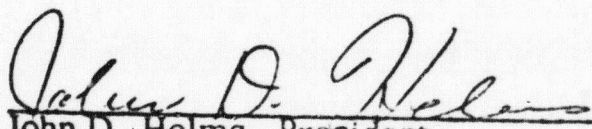
County, Texas of apparatus as described and claimed in said United States Letters Patent No. 3,853,222 and the sale of such apparatus in Dallas County, Texas to Unique Sports Products, Inc.

19. Unique Sports Products, Inc. and Matchpoint Industries, Inc. have no relationship other than a contract involving the sale of apparatus as described and claimed in said United States Letters Patent No. 3,853,222 to Unique Sports Products, Inc., and there is no inter-related ownership or control between the two corporations.

20. On June 2, 1975 a copy of the Summons and Complaint in this action was delivered by registered mail to the offices of Matchpoint Industries, Inc. 13547 Rawhide, Farmers Branch, Texas.

21. No officer, agent, director or representative of Matchpoint Industries, Inc. has been served with process in the Southern District of New York.

Further Deponent sayeth not.

  
John D. Helms, President  
Matchpoint Industries, Inc.



## AFFIDAVIT OF DAVID H. KENNINGTON IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

REBOUND SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No.
	)	75 CIV 2303
MATCHPOINT INDUSTRIES, INC.,	)	
	)	
Defendant.	)	

AFFIDAVIT

I, DAVID H. KENNINGTON, being duly sworn and being above the age of 21 years and being fully competent, depose and say that:

1. I reside at 4405 McFarlin, Dallas, Dallas County, Texas.
2. I am Vice President and Chairman of the Board of Directors of Matchpoint Industries, Inc., Defendant in the above-styled cause, and am authorized to make this affidavit in behalf of the corporation.
3. I have direct personal knowledge of the corporation's organization and business activities and of the facts recited herein.
4. On July 1, 1973 Matchpoint Industries, Inc. entered into an agreement with Unique Sports Products, Inc., a Texas corporation, under the terms of which Matchpoint Industries, Inc. agreed to manufacture and

## AFFIDAVIT OF DAVID H. KENNINGTON IN SUPPORT OF MOTION

sell pressurization apparatus for storing and rejuvenating tennis balls to Unique Sports Products, Inc. exclusively for a period of two years.

5. Matchpoint Industries, Inc. has never sold any pressurization apparatus for storing and rejuvenating tennis balls to any person, firm or corporation other than Unique Sports Products, Inc.

6. All transactions involving the sale and delivery of such pressurization apparatus have occurred in Dallas County, Texas.

7. All such pressurization apparatus manufactured and sold by Matchpoint Industries, Inc. have been delivered to Unique Sports Products, Inc. in Dallas County, Texas.

8. Matchpoint Industries, Inc. has never sold nor shipped any goods outside Dallas County, Texas.

9. Matchpoint Industries, Inc. has entered into no contracts or agreements to sell or ship any goods outside Dallas County, Texas.

10. The only relationship between Matchpoint Industries, Inc. and Unique Sports Products, Inc. is that of independent contractors under the terms of the Agreement of July 1, 1973.

11. There are no common officers, directors, or stockholders in Matchpoint Industries, Inc. and Unique Sports Products, Inc.



## AFFIDAVIT OF DAVID H. KENNINGTON IN SUPPORT OF MOTION

12. Matchpoint Industries, Inc. does not participate in any profits or losses of Unique Sports Products, Inc.

13. Matchpoint Industries, Inc. has no control over the activities of Unique Sports Products, Inc.

14. On or about January 24, 1975 I was advised by my attorney, Jack A. Kanz, that Mr. Jay Monroe, President of Tensor Corporation, had called Mr. Kanz on that date and requested that I call Mr. Monroe.

15. On or about January 27, 1975 I called Mr. Monroe and, pursuant to his request, agreed to meet with him on the 30th day of January, 1975 in his office in Brooklyn, New York.

16. On January 30, 1975, pursuant to his request, I met with Mr. Monroe in Brooklyn, New York. On that date Mr. Monroe and I discussed the pressurization apparatus manufactured by Matchpoint Industries, Inc. and generally discussed the market potential thereof. At no time did we discuss sale of such apparatus to Tensor Corporation by Matchpoint Industries, Inc. No agreements or contracts were discussed or entered into. Our meeting and discussion lasted about two to two and one-half hours. Matchpoint Industries, Inc. has had no further communication with Tensor Corporation.

17. At no time did I ever threaten to sue Tensor Corporation nor was the subject of litigation discussed with Tensor Corporation.

## AFFIDAVIT OF DAVID H. KENNINGTON IN SUPPORT OF MOTION

18. During the period between about January 1, 1975 and January 23, 1975 Mr. Bernard J. Jacobson, President of Rebound Systems, Inc., called the offices of Matchpoint Industries, Inc. in Farmers Branch, Texas. On that occasion Mr. Jacobson advised Mr. John Helms that Mr. Jacobson desired to discuss a license under U.S. Patent No. 3,853,222.

19. On or about January 27, 1975 I telephoned Mr. Jacobson and, pursuant to his request, agreed to meet with him in New York on the 30th day of January, 1975.

20. On January 30, 1975 I met with Mr. Jacobson at the Harvard Club in New York, New York. At that time Mr. Jacobson repeated his request to negotiate a license under U.S. Patent No. 3,853,222. Licensing under said patent was discussed in general terms only and no demand, request or offer was made by either Mr. Jacobson or myself. At no time was litigation discussed. Our meeting lasted about one and one-half to two hours.

21. On several occasions subsequent to January 30, 1975 Mr. Jacobson called me in Dallas, Texas to discuss licensing under said patent. No specific terms were ever discussed. However, I did advise Mr. Jacobson that Matchpoint Industries, Inc. would entertain any specific proposal he might offer. No specific proposal was ever offered.

Further Deponent sayeth not.

(Sworn to by David H. Kennington, Vice President and Chairman of the Board of Directors of Matchpoint Industries, Inc., September 30, 1975.)



EXHIBIT 1, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION.

21 October 74

CERTIFIED MAIL --617475  
RETURN RECEIPT REQUESTED

Tensor Corporation  
333 Stanley Avenue  
Brooklyn, N. Y. 11207

Attention: Office of the President

Gentlemen:

We represent Matchpoint Industries, Inc. manufacturers of the  
'Bouncer' pressurized tennis ball container.

We have recently been informed that you are now advertising a  
"Tennis Ball Refurbisher" for sale under the name 'Rebounder'. From the  
information at hand, it appears that your 'Rebounder' may incorporate the  
functional design of the 'Bouncer' device.

The device manufactured by Matchpoint Industries, is described  
in U. S. Patent Application Serial No. 372,332. Claims 1-8 have been  
allowed and the application will issue as a U. S. Patent within the next  
few months. A copy of the allowed claims is enclosed for your review.  
We would appreciate the opportunity to inspect your apparatus as soon  
as it becomes available.

Furthermore, in our opinion the mark 'Rebounder' is little more  
than a colorable imitation of the mark 'Bouncer' when applied to such  
similar goods. As such we believe that your selection of the mark  
'Rebounder' is an obvious attempt to trade on the goodwill associated with  
my client's mark and will cause confusion in the minds of the purchasing  
public. Accordingly, if you proceed with marketing the advertised device,  
we must insist that you refrain from use of the mark 'Rebounder' or any  
other mark confusingly similar to the mark 'Bouncer'.

Very truly yours,

JACK A. KANZ

JAK/pc  
Enclosure

EXHIBIT 2, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION

JACK A. KANZ

ATTORNEY AT LAW

DAVIS BUILDING, 1309 MAIN STREET

DALLAS, TEXAS 75202

29 October 74

TELEPHONE 214/742-5413

CERTIFIED MAIL - 617476  
RETURN RECEIPT REQUESTED

Rebound Systems, Inc.  
1129 Northern Blvd.  
Manhasset, New York 11030

Attention: Office of the President

Gentlemen:

We represent Matchpoint Industries, Inc. manufacturers  
of the 'Bouncer' pressurized tennis ball container.

We have recently been informed that you are now advertising  
a pressurized tennis ball container for sale under the name 'Rebound'. From  
the information at hand, it appears that your 'Rebound' may incorporate the  
functional design of the 'Bouncer' device.

The device manufactured by Matchpoint Industries is described  
in U. S. Patent Application Serial No. 372,332. Claims 1-8 have been  
allowed and the application will issue as a U. S. Patent within the next  
few months. A copy of the allowed claims is enclosed for your review.

Furthermore, in our opinion the mark 'Rebound' is little  
more than a colorable imitation of the mark 'Bouncer' when applied to  
such similar goods. As such we believe that your selection of the mark  
'Rebound' is an obvious attempt to trade on the goodwill associated with  
my client's mark and will cause confusion in the minds of the purchasing  
public. Accordingly, we must insist that you refrain from use of the mark  
'Rebound' or any other mark confusingly similar to the mark 'Bouncer' in  
connection with the advertising or sale of any pressurized tennis ball  
container.

Very truly yours,

JACK A. KANZ

K/c  
Enclosure



EXHIBIT 3, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION.

LAW OFFICES

LEVY AND MALINA

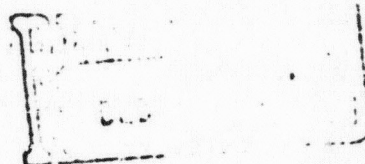
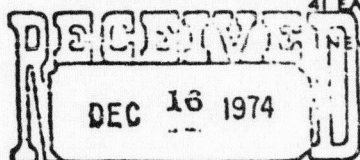
JACK A. KANZ

41 EAST FORTY-SECOND STREET

NEW YORK, NEW YORK 10017

BERNARD MALINA  
EDWARD F. LEVY

PATENT AND  
TRADEMARK LAW



TELEPHONE

(212) 490-0770

CABLE ADDRESS

LEMALPAT NEWYORK

By \_\_\_\_\_

By \_\_\_\_\_

December 13, 1974

Jack A. Kanz, Esq.  
Davis Building  
1309 Main Street  
Dallas, Texas 75202

Re: Matchpoint Industries, Inc.

Dear Mr. Kanz:

Your letters of October 21, 1974, addressed to Tensor Corporation and Rebound Systems, Inc., have been referred to us for consideration. In these letters, you say that the Matchpoint Industries patent application Serial No. 372,322 has been allowed with the claims 1-8 which you enclosed, and that the patent will soon issue.

In examining the claims you enclosed, we find that claims 2 through 8 cover structural features which are not employed in the tennis ball refurbisher of our clients. Claim 1 is drawn in terms of very wide scope and purports to cover broadly a collar mounted on a container having a flange near its open end, a cap removably mating with the collar and forming a seal with the top surface of the container flange, and means for injecting gas through the cap to the interior of the container.

The tennis ball refurbisher of our clients includes a split ring mounted on the tennis ball can, which ring is screw-threaded to mate with complementary screw threading on a cover, in such a manner that when the cover is screwed on, a gasket in the cover makes sealing contact with a flange at the top of the can. Our clients advised us, however, that it is quite common to provide a removable ring for purposes of attaching a cover or other member to a container or other body in this manner, and that such coupling is found in pipe joints, fish tank aerators, pressure containers, etc. Consequently, we conducted a search in the U.S. Patent Office to determine the novelty, if any, in the subject matter of claim 1 of the Matchpoint patent application.



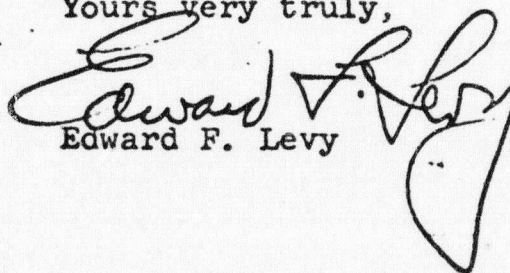
EXHIBIT 3, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION

Our search confirmed that it is well known to couple opposed bodies by means of a removable ring on one body which mates with ribs, screw threads or other means on the opposed body, with the coupling member providing a seal between the two bodies. A large number of patents were found showing such arrangement. Further, some of these patents show containers mounting such a coupling ring and having a cap or cover which mates with the ring to make a seal with a flange at the top of the container. We call your attention to U.S. patent No. 253,279 (Norton) issued in 1880, and U.S. patent No. 2,097,681 (Wolcott) issued in 1937, in this connection.

We particularly call your attention to U.S. patent No. 3,170,607 (Anthon) issued in 1965 which discloses a pressure container not only having a loosely mounted coupling ring which mates with the cap to provide a seal with a flange on the container mouth, but also includes means for injecting gas under pressure into the interior of the container through the cap. This patent shows each and every element defined in claim 1 of the Matchpoint patent application, and unquestionably invalidates this claim.

Undoubtedly, the Examiner, in allowing claim 1 of the application, was unaware of the existence of this Anthon patent, and we suggest that it be brought to his attention or that claim 1 be cancelled or disclaimed. Otherwise its presence in the Matchpoint patent would adversely affect the validity of the entire patent. In any event, we can not see how any claim of the Matchpoint patent application, if ultimately issued, can be asserted against the tennis ball refurbisher of our clients.

Yours very truly,

  
Edward F. Levy

EFL:le



EXHIBIT 4, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION.

30 December 74

Mr. Edward F. Levy  
Levy and Malina  
41 East Forty-Second Street  
New York, New York 10017

Re: Matchpoint Industries, Inc.  
Our File No. L 3725

Dear Mr. Levy:

Your letter of December 13, 1974 has been received and the patents cited therein considered. Meanwhile, the Matchpoint application has now issued as U. S. Patent No. 3,853,222 (copy enclosed).

With regard to the patents you cited, please note that U. S. Patent No. 253,279 issued to C. J. Grellner on February 7, 1982 and relates to a hammer. No relationship between the disclosure of Grellner and the claims in U. S. Patent No. 3,853,222 is apparent. Likewise, we are wholly unable to find any relationship between the coffee maker of Wolcott (U.S. Patent No. 2,097,681) or the closure of Anthron (U. S. Patent No. 3,170,607) and the claims of the Matchpoint patent. Accordingly, we must disagree with your statement that the validity of the claims is subject to question.

Your letter of December 13, 1974 wholly ignores your client's use of the marks 'Rebound' and 'Rebounder'. We remain of the opinion that the use of these marks constitutes a clear infringement of our client's rights in the mark 'Bouncer' and must insist that you refrain from use of these or any other confusingly similar marks in connection with the sale or advertising of any pressurized tennis ball container.

A prompt statement of your intentions is expected.

Very truly yours,

JACK A. KANZ

JAK/pc

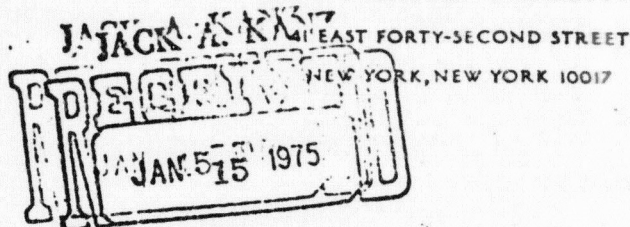
bcc: John Helms  
13,547 Rawhide  
Dallas, Texas



EXHIBIT 5, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION.

LAW OFFICES

LEVY AND MALINA

BERNARD MALINA  
EDWARD F. LEVYPATENT AND  
TRADEMARK LAWTELEPHONE  
(212) 490-0770CABLE ADDRESS  
LEMALPAT NEWYORK

January 6, 1975

By By

Jack A. Kanz, Esq.  
Davis Building  
1309 Main Street  
Dallas, Texas 75202

Re: Matchpoint Industries, Inc.  
Your file No. L3725

Dear Mr. Kanz:

In reply to your letter of December 30, 1974, the correct number of the Norton patent which we cited is No. 235,279 and not 253,279 as originally listed. We regret any inconvenience caused you by this typographical error, and enclose a copy of this patent for your convenience.

We have examined the Helms patent No. 3,853,222 which you enclosed. As we mentioned in our last letter, we are concerned only with claim 1 of this patent since the remaining claims 2 through 8 recite structural elements which are not employed in our client's device.

We note the statement in your letter that you are wholly unable to find any relationship between the Wolcott patent No. 2,097,681 or the Anthon patent No. 3,170,607 and the claims of the Matchpoint patent. In this connection, we wish to emphasize that we have been referring only to claim 1 with regard to validity, although it is probable that the remainder of the claims are also lacking in novelty.

We note that claim 1 does not define a tennis ball can assembly, but rather apparatus for enclosing and sealing the open end of a cylindrical container in general, which makes such patents as Wolcott and Anthon highly pertinent. Even if this were not the case, we call your attention to the Wilson patent No. 3,233,727 which shows a cylindrical tennis ball can having a removable cap which mates with a flange at the mouth of the can to provide a



## EXHIBIT 5, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION

seal, the can having an inlet opening closed by a valve. Gas under pressure is admitted to the interior of the container by insertion of the hollow needle of a hand pump through the inlet opening and valve.

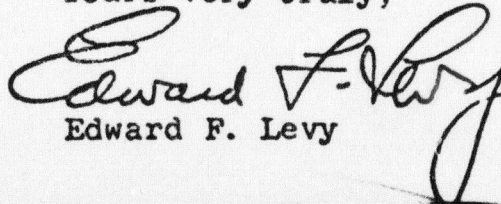
The only element defined in claim 1 of the Helms patent No. 3,853,222 which is not disclosed in the Wilson patent is the collar means mounted on the container and cooperating with the container top flange to provide an element for attaching the cap. The Wilson top flange performs this same function but is integral with the container, whereas the Helms collar can be mounted on any standard container having a top flange or bead.

The concept of using a separate collar or ring for removable attachment of two opposed members so as to provide an air-tight seal, is old and well-known and is shown in a considerable number of prior patents, relating to pipe couplings or the like. Several of these relate to caps for containers, and in this connection we call you attention to the Norton patent No. 235,279 (1880) as well as to the Bates patent No. 2,241,501 (1941). The structures shown in these patents would read upon claim 1 of the Helms patent, except that they lack means for injecting gas through the cap to the interior of the container.

The Anthon patent No. 3,170,607 in our last letter, does, However, read precisely on claim 1 of the Helms patent since, in addition to the flange, collar and seal, it also includes means for injecting gas through the cap into the interior of the container. Enclosed is a breakdown of claim 1 with corresponding elements of the Anthon patent identified.

Our client, therefore, does not intend to change the structure of its tennis ball refurbisher. With regard to your charge of trademark infringement, we do not believe that our client's use of the marks "Rebound" or "Rebounder" would be confusingly similar to the mark "Bouncer." However, in order to avoid a conflict in this regard, our client is taking steps to change its trademark before it commences full-scale distribution of the item.

Yours very truly,

  
Edward F. Levy

EFL:le

EXHIBIT 5, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTIONHELMS PATENT NO. 3,853,222  
Claim 1

1. Apparatus for enclosing and sealing the open end of a cylindrical container having an outwardly radially extending flange near the open end comprising

a. Collar means adapted to surround the outer surface of said container and having an internal dimension less than the external dimension of said flange,

b. Cap means adapted to removably mate with said collar means and form a seal with the top surface of said flange, and

c. Means for injecting gas through said cap means into the interior of said container.

ANTHON PATENT NO. 3,170,607

Apparatus 11 for cylindrical container 13 with outwardly radially extending flange 14 near open end of neck 12.

Collar or ring 33 surrounding outer surface of container neck and having, with its mounted O-ring, an internal diameter less than the external diameter of flange 14.

Caps 16 removably mates with collar 33 and forms seal, through O-ring 17 with top surface of flange 14.

Gas inlet tube 23 is means for injecting gas under pressure into the interior of container.



34a

EXHIBIT 6, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION.

MATCHPOINT INDUSTRIES  
P.O. Box 34829  
Dallas, Texas 75234

5-22

May 12, 1975

Mr. Bernard Jacobson  
303 E. 57th Street  
New York, New York

Dear Bernie:

Here is a copy of the license agreement signed on the  
"Bouncer." Certain information has been deleted but  
the basic conditions remain.

Let's talk when you have had a chance to review.

Sincerely,

MATCHPOINT INDUSTRIES

Dave Kennington

DK:cs

Encl.

EXHIBIT 6, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTIONLICENSE AGREEMENT

Agreement by and between [REDACTED], a corporation organized and existing under and by virtue of the laws of the State of [REDACTED], with its principal place of business at [REDACTED] (hereinafter referred to as "Licensor") and [REDACTED], a corporation organized and existing under and by virtue of the laws of the State of Texas, with its principal place of business at [REDACTED] Texas (hereinafter referred to as "Licensee").

## WITNESSETH:

WHEREAS the Licensor represents that it is the sole and exclusive owner of all right, title and interest in and to certain improvements in [REDACTED] as described and claimed in a certain United States Letters Patent Serial No. [REDACTED] (hereinafter referred to as the "Invention"), and

WHEREAS the Licensee is desirous of acquiring a non-exclusive right and license to manufacture, sell and use apparatus embodying, employing or containing the Invention (hereinafter referred to as the "Licensed Apparatus") throughout the United States and its territories;

NOW THEREFORE, this agreement witnesseth, that for and in consideration of the mutual covenants herein contained and in consideration of the sum of One (\$1.00) Dollar and other good and valuable consideration each to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto have covenanted and agreed and do hereby covenant and agree as follows:



## EXHIBIT 6, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION

1. The Licenser has granted, conveyed, and by these presents does grant and convey unto the Licensee a non-exclusive right and license to manufacture, sell and use apparatus embodying, employing or containing the Invention throughout the United States and its territories, to the full end of the term for which said Letters Patent has been granted unless this agreement is sooner terminated as hereinafter provided.

2. The Licenser, as a condition and covenant, hereby represents, covenants and agrees that it is the sole and exclusive owner of the entire right, title and interest in and to the aforesaid Invention; that it has the right to grant the right, license and privilege hereby granted; and that it has executed no contract or agreement in conflict herewith.

3. The Licensee covenants and agrees to pay to the Licenser a royalty of ~~the net purchase price paid by Licensee for any extrusion from which Licensed Apparatus was manufactured and sold by Licensee during the preceding calendar year, such statements to be accompanied by check in payment of the royalty for the period covered thereby. The first statement shall be rendered not later than thirty (30) days after execution of this agreement and shall cover the period from November 5, 1974 to December 31, 1974. Subsequent statements and checks shall be rendered not later than the 2nd day of March of each year during the term of this agreement.~~

4. The Licensee, within sixty (60) days after the last day in each and every calendar year during the continuance of this agreement, agrees to furnish to the Licenser written statements, under oath, specifying the net purchase price paid by Licensee for any extrusion from which Licensed Apparatus was manufactured and sold by Licensee during the preceding calendar year, such statements to be accompanied by check in payment of the royalty for the period covered thereby. The first statement shall be rendered not later than thirty (30) days after execution of this agreement and shall cover the period from November 5, 1974 to December 31, 1974. Subsequent statements and checks shall be rendered not later than the 2nd day of March of each year during the term of this agreement.

5. For purposes of determining royalties accruing under the provisions of paragraph 3 and 4 hereof, the Licensed Apparatus shall be considered sold when billed out, or if not billed out, when delivered or when paid for if paid for before delivery; it being understood that in no event shall the Licensee be required to pay more than once on any apparatus previously



EXHIBIT 6, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION

reported and paid for but which may have been returned by the original purchaser for credit and resold by Licensee. If the Licensed Apparatus is not actually sold by the Licensee but is delivered to another person, firm or corporation in exchange for services, advertising, or the like, or if the Licensed Apparatus is leased, rented or otherwise put into service without removing title thereto from the Licensee, such apparatus shall be considered sold on the date such Licensed Apparatus leaves the actual possession and custody of the Licensee.

6. The Licensee agrees to keep full, accurate and complete books of account, records and memoranda respecting the manufacture and use of the Invention, showing the number and kind of apparatus manufactured and sold in sufficient detail to enable the sums payable hereunder by the Licensee to be determined; and further agrees to and does hereby give to a Certified Public Accountant or Accountants for the State of Texas, to be designated by the Licensor, the privilege of examining its books and records at all reasonable times and from time to time for the purpose of verifying reports provided for herein.

7. The Licensor may terminate this License Agreement only upon commission of a material breach of one or more of the provisions of this agreement by the Licensee which shall have not been rectified within sixty (60) days after notification thereof by the Licensor. The Licensee may terminate this Agreement at any time by written notice mailed to Licensor. Such termination shall be effective on the expiration of thirty (30) days after such written notice is mailed to Licensor. Termination by either party shall not affect any obligation to pay royalties accrued prior to the effective date of such termination.

8. The effective date of this agreement shall be November 5, 1974, regardless of the date of execution hereof.

9. The Licensor hereby expressly releases and discharges the Licensee, its customers, agents, successors and assigns, from any claim for infringement of said U. S. Letters Patent No. ~~2,855,552~~ which may have arisen prior to the effective date of this License Agreement.



EXHIBIT 6, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION

10. This agreement shall be construed in accordance with the laws of the State of Texas and shall bind and apply to the successors and assigns of the Licensor; and may inure to the benefit of, may be transferable to, and be binding upon the successors and assigns of the Licensee.

IN WITNESS WHEREOF, each party hereto has caused these presents to be signed in its name by its President, and its seal hereunto affixed, attested by its Secretary.

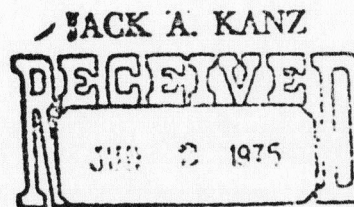
EXHIBIT 7, ANNEXED TO MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION.

MATCHPOINT INDUSTRIES

P. O. Box 34829  
Dallas, Texas 75234

May 30, 1975

Mr. Bernard J. Jacobson  
Rebound Systems, Inc.  
1129 Northern Boulevard  
Manhasset, New York 11030



Dear Mr. Jacobson:

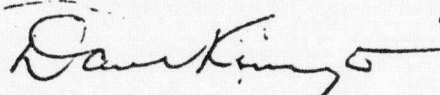
By \_\_\_\_\_

This will confirm our telephone conversation of May 29th.

In view of our estimate of the market size and potential for the Bouncer, we do not feel it wise to license anyone else under our patents. Regardless of the information given you previously, we have not licensed any other company nor do we intend to do so in the immediate future.

Sincerely,

MATCHPOINT INDUSTRIES



Dave Kennington

DX:cs

CC: Mr. Jack Kanz  
✓ Davis Building  
1309 Main Street  
Dallas, Texas 75202

Mr. John Helms  
13547 Rawhide  
Dallas, Texas 75234



APPENDIX A, ANNEXED TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION.

DISTRIBUTORSHIP AGREEMENT

STATE OF TEXAS     )  
                              )  
COUNTY OF DALLAS    )

NR.  
9/14 1973

AGREEMENT MADE July 1, 1973, between Match Point Industries, Inc., a Texas corporation, with principal offices located in Dallas, Texas (hereinafter called the "Manufacturer") and Unique Sports Products, Inc., a Texas corporation, with principal offices located in Dallas, Texas (hereinafter called the "Distributor").

WHEREAS, the Manufacturer represents that it is the owner and manufacturer of a device for maintaining pressure and resealing tennis ball cans, and that it has the sole right to grant an exclusive license to sell and to promote the sale of said product, and

WHEREAS, the Distributor desires an exclusive license to sell and to promote the sale of said product,

IT IS, THEREFORE, AGREED:

1. Independent Contractors. Each of the parties to this Agreement acknowledges that it is entering into this Agreement as an independent contractor, and at no time during the term of this Agreement will either party be acting as agent for the other. Neither party has any authority to represent the other as agent, nor to bind the other by any contract, representation, understanding, act or deed concerning the Product covered by this Agreement.

APPENDIX A, ANNEXED TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION

2. Licenses. The Manufacturer hereby grants to the Distributor the exclusive and non-transferable right and license to market and sell at retail in the United States and all the world the product known as the "BOUNCER" (hereinafter called "Product"), which is a device for maintaining pressure and resealing tennis ball cans. A description of said Product is more fully set forth in Exhibit "A" hereto, which is incorporated herein for all intents and purposes. This Agreement covers only said Product, but other products may be added to this Agreement by mutual consent and by contract amendment. During the term of this Agreement, the Distributor agrees that it will not purchase, distribute, manufacture, or market any product similar to the Product covered by this Agreement for any person, firm or corporation other than the Manufacturer herein.

3. Warranty of Ownership of Product. The Manufacturer warrants and represents that it is the sole owner of all proprietary rights in and to the Product, and as the sole owner of the Product can enter into this Agreement without the necessity of joining any other individual, firm, corporation or entity.

4. Price. The Manufacturer agrees to sell the Product to the Distributor at the following prices:

From beginning date of this  
Agreement through December  
31, 1973

From January 1, 1974, until  
January 1, 1975

NR PRL



APPENDIX A, ANNEXED TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION

These prices are based on a retail selling price of

but any modification in retail selling price shall modify  
the Manufacturer's price to the Distributor as follows:

Should the retail price of the basic Product be increased, the Manufacturer's sale price to the Distributor shall be increased by

Should the Distributor's retail price be lowered, the Manufacturer's price will be lowered accordingly to a level of not less than

In event the Distributor chooses to pursue a value added packaging technique, private branding, or specific promotional packages such as marketing Product combined or assembled to a private labeled can, the Manufacturer would allow an exemption from the formula equal to the above ratio of value increase of the added features.

A basic Product is defined as the pump assembly, valve, seal, locking ring, and holding ring.

Changes in product symbolization or limited runs for private brands or configurations will be subject to separate negotiations.

It is the intent of this part of the agreement to promote a participating type of venture between the parties involved and encourage the parties to pursue innovative marketing techniques to the mutual benefit of both parties.

5. Billing. The Manufacturer shall bill the Distributor at the time of shipment. Terms shall be net 60 days, F.O.B. Dallas. In the event that the Distributor shall become more than 30 days delinquent in the payment of any obligation to the Manufacturer, and should such delinquency continue for more than 10 days after the Distributor has received written



APPENDIX A, ANNEXED TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION

notice of delinquency from the Manufacturer, the Manufacturer shall have the option to terminate this Agreement, upon which termination all relationships between the parties shall cease and all rights of either party under this Agreement shall terminate.

6. Preparation of Product for Shipment. The Distributor shall supply all packaging material and containers at its expense to the <sup>DISTRIBUTOR'S WAREHOUSE</sup> Manufacturer's place of business in Dallas, Texas. <sup>DISTRIBUTOR'S WAREHOUSE</sup> The Manufacturer will then be responsible for placing the Product in the individual package, placing the package in the shipping container, sealing the box, and arranging for shipment. At Distributor's instructions, the Manufacturer shall deliver either to the Distributor's warehouse in Dallas or shall ship directly to customers upon receipt of shipping papers from Distributor.

7. Minimum Orders. The Distributor agrees to purchase a minimum of \_\_\_\_\_ of the Product within the first twelve (12) months of availability of the Product from the Manufacturer, and the Manufacturer agrees to supply the minimum production of \_\_\_\_\_. Thereafter, the minimum quantities per year shall be negotiated annually by amendment to this Agreement.

It is contemplated that the \_\_\_\_\_ will be purchased at the approximate rate \_\_\_\_\_ but in no event shall the Distributor be required to purchase more



APPENDIX A, ANNEXED TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION

than period unless the Distributor voluntarily agrees to do so.

8. Best Efforts. The Distributor shall use its best efforts to develop a substantial demand for the Product both for wholesale distribution and retail distribution, and shall provide adequate facilities within its organization for all marketing, accounting, advertising, billing, and collection procedures necessary to sale of the Product. All risks or credit losses shall be upon the Distributor.

9. Rights to Orders. All orders for the Product received by either party hereto shall be deemed to be an order placed with the Distributor and shall be subject to the terms of this Agreement. All sales of the Product made by either party hereto shall be treated as though said sales were made by the Distributor.

10. Assignment. This Agreement may not be assigned by the Distributor nor the performance of its duties thereunder delegated. The Distributor shall have no right to grant sub-licenses without the written approval of the Manufacturer. Any assignment of the Manufacturer's rights and/or ownership interest in and to the Product will specifically be made subject to and limited by all terms and provisions of this Agreement, and any assignee of the Manufacturer shall be subject to the same duties and obligations of the Manufacturer to the Distributor. The Manufacturer hereby covenants that it



APPENDIX A, ANNEXED TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION

give notice in writing to the Distributor at least thirty (30) days in advance of any such assignment.

11. Application for Patent. The Manufacturer shall pursue the obtaining of a valid United States patent on the Product. In the event of suit brought against the Distributor of the Manufacturer for any alleged infringement of a patent on a similar device, the Manufacturer agrees to defend said suit and to pay all costs and attorney's fees incurred therein. However it is specifically recognized by the Manufacturer that the name "BOUNCER" was created by the Distributor and all rights to the use of said name belong exclusively to the Distributor. In the event of termination of this Agreement, the Manufacturer shall have no right to manufacture or sell the Product under the name "BOUNCER". In event a patent is not issued the above parties, a confidential trade secret relationship in which costs, marketing methods, manufacturing methods, and individual business organization are their exclusive property and not the property of any other persons or organizations.

12. Manufacturer's Inability to Perform. In the event that the Manufacturer is at any time unable to manufacture and deliver the Product to the Distributor in accordance with this Agreement due to insolvency, or due to any cessation of its business, which inability exists for more than 90 days, <sup>NR</sup> then the Distributor shall have the right to immediately obtain possession of the plans, specifications and drawings of the



APPENDIX A, ANNEXED TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION

Product in order to manufacture the Product and fulfill the Distributor's delivery requirements on orders it has received. At such time as the Manufacturer is able to resume the manufacturing of the Product, the Distributor shall cease the manufacturing of the Product, except for work in progress, and the parties shall then proceed according to the terms of this Agreement.

13. Promotion of Product. Every effort will be made to obtain and retain Product leadership. The Manufacturer shall make every effort to reduce manufacturing costs as required to maintain a competitive standing in the market place or to meet any competition. The Distributor hereby agrees that, during the remainder of 1973, it will exercise its best judgment as to the amount of money, if any, to be allocated to advertising and promotion of the Product. However, commencing January 1, 1974, the Distributor agrees to set aside at least five (5%) percent of the distributor's net sales price for either direct advertising promotion or advertising in connection with sales representatives or retailers.

14. Design Changes of Product. The Manufacturer shall have the right to suggest and propose design changes which will reduce cost, improve performance, or enhance the value of the Product. The Distributor shall be obligated to accept such changes unless specific valid reasons are given which would relate to the Product's safety, function, or salability.

APPENDIX A, ANNEXED TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION

15. Defective Merchandise. The Manufacturer agrees at all times to carry suitable product liability insurance on the Product, and does hereby indemnify and hold harmless the Distributor from any liability arising from a Product defect. Further, the Manufacturer warrants that all Products produced shall functionally fulfill requirements of the Product, and in the event of defective merchandise, said defective merchandise will be replaced solely at the Manufacturer's expense.

16. Modification. No renewal or termination hereof, or modification or waiver of any of the provisions herein contained, or any future representation, promise, or condition in connection with the subject matter hereof shall be binding upon either the Manufacturer or the Distributor unless made in writing and signed by proper officers. A mere acknowledgment or acceptance of any order inconsistent with the terms of this Agreement, or the making of deliveries pursuant thereto, shall not be deemed an acceptance or approval of such inconsistent provisions.

17. Construction. This instrument contains the entire Agreement between the parties, and is to be construed according to the laws of the State of Texas.

18. Separable Provisions. Any provision in this Agreement which in any way contravenes the law of any state in which this Agreement is effective, shall, in such state,



APPENDIX A, ANNEXED TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION

to the extent of such contravention of law, be deemed separable and shall not affect any other provision hereof or the validity thereof. This contract term is for two (2) calendar years from the agreement date.

MATCH POINT INDUSTRIES, INC.

BY: Charles D. HolmesBY: David H. Kennedy

UNIQUE SPORTS PRODUCTS, INC.

BY: Neil D. Roush

AFFIDAVIT OF JAY MONROE IN OPPOSITION TO MOTION.  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

REBOUND SYSTEMS, INC.,

Plaintiff,

vs.

MATCHPOINT INDUSTRIES, INC.

Defendant.

Civil Action No.  
75 CIV 2303

AFFIDAVIT

JAY MONROE, being duly sworn, deposes and  
says as follows:

1. I reside at 157 West Shore Road, Great Neck,  
New York.

2. I am President of Tensor Corporation, a  
corporation of the State of New York, with offices at  
333 Stanley Avenue, Brooklyn, New York, and have personal  
knowledge of the corporation's organization and business  
activities, and of the facts herein recited.

3. Tensor Corporation is engaged in the business  
of manufacturing and distributing tennis equipment including  
tennis racquets, tennis balls, racquet strings, and other  
related accessories throughout the United States, and is  
one of the leading companies in this field. It has  
established and now maintains extensive distribution  
channels, including large chain store firms and department  
stores, for its merchandise.



## AFFIDAVIT OF JAY MONROE IN OPPOSITION TO MOTION

4. In April 1974, Tensor Corporation had considered, and approved for its distribution, a device for pressurizing tennis ball containers, manufactured by Rebound Systems, Inc. Negotiations had been conducted with Rebound Systems, Inc. and concluded to such an extent, that it was decided by both companies that Tensor Corporation was to be the exclusive distribution agent for the pressurizing apparatus to the sporting goods trade. During the late summer and fall of 1974, labels were designed and printed for the product, which was to be sold under the name "Tensor Rebounder," and Tensor Corporation spent substantial sums for printing catalogs which featured the product, in having product releases placed in trade magazines, and in advising sales representatives that the product was being introduced into the Tensor line. Initial orders were also taken for the product.

5. In October, 1974, Tensor Corporation received a letter dated October 21, 1974 from Jack Kanz, Esq., the attorney for Matchpoint Industries, Inc., by certified mail, return receipt requested, advising that Matchpoint had a pending patent application covering their pressurized tennis ball container, and that the patent application had been allowed and would issue as a patent in a few months. Enclosed with the letter were a set of patent claims which were stated to have been allowed in the application. The letter further indicated that from information on hand, it appeared that the Tensor "Rebounder" apparatus infringed the

AFFIDAVIT OF JAY MONROE IN OPPOSITION TO MOTION enclosed claims. The letter also complained of the use of the trademark "Rebounder" which was alleged to be a "colorable imitation" of the trademark "Bouncer," allegedly owned by Matchpoint Industries, Inc.

6. Upon receipt of the letter from Mr. Kanz, I was concerned with the possibility of a lawsuit against Tensor Corporation, and consulted our general counsel who advised me that no patent suit could be brought against Tensor Corporation unless and until a patent would issue. I was, however, concerned with the charge of trademark infringement, and after discussions with the principals of Rebound Systems, Inc., it was agreed to change the name "Rebounder" to a different name in order to avoid any legal conflict with Matchpoint Industries, Inc. I also turned over Mr. Kanz's letter to Rebound Systems, Inc. for the purpose of having their patent attorneys investigate the patent matter, and determine whether or not a valid patent was likely to issue. Rebound Systems, Inc. advised me that they had received a similar letter from the attorney for Matchpoint Industries, Inc. and were having their attorneys research the matter of possible infringement and validity of the patent claims.

7. On or about December 4, 1975, Rebound Systems, Inc. advised me that their attorneys had completed their investigation of the patent matter, had determined that most of the claims were not infringed by the Rebound product, and had found on a search a number of prior patents which appeared to invalidate the broader claims



## AFFIDAVIT OF JAY MONROE IN OPPOSITION TO MOTION

of the Matchpoint patent application. They also advised that their attorney was corresponding with Mr. Kanz and was suggesting that the broader claims be cancelled from the patent application because of their evident invalidity.

8. On or about January 6, 1975, Rebound Systems, Inc. advised me that their patent attorneys had learned from Mr. Kanz that the Matchpoint patent had issued with the same claims as originally sent us by Mr. Kanz, and that Mr. Kanz had disagreed with the assertion that the broader claims were invalid over the prior art found on the attorneys' search. Shortly thereafter, on January 7, 1975, at a meeting with the principals of Rebound Systems, Inc., I advised them that Tensor Corporation would not conclude a distributionship agreement with Rebound Systems, Inc. and would not become a distributor for the Rebound product unless the patent controversy was resolved between Rebound Systems, Inc. and Matchpoint Industries, Inc., or unless Rebound Systems could furnish Tensor Corporation with a full indemnification in the event of suit.

9. Tensor Corporation had representatives attending the Sporting Goods Show held at Houston, Texas in January, 1975. During this trade show, Mr. Stanley Jaret, Executive Vice President of Tensor Corporation, called me and advised me that he had spoken to Mr. David Kennington of Matchpoint Industries, Inc. and was told by



## AFFIDAVIT OF JAY MONROE IN OPPOSITION TO MOTION

Mr. Kennington that Matchpoint Industries, Inc. intended to enforce its patent against Rebound Systems, Inc. and that Tensor Corporation would be involved in such litigation if they distributed the apparatus. I was further advised that Mr. Kennington also told Mr. Jaret that Matchpoint Industries might consider using Tensor Corporation as a distributor for its own pressurizing apparatus, and that he asked Mr. Jaret if Tensor Corporation would be interested in selling its "Bouncer" merchandise.

10. On or about January 24, 1975, I called Mr. Kanz, the attorney for Matchpoint Industries, Inc. who had previously written to Tensor Corporation, and advised him that Tensor Corporation had not consummated a distributorship agreement with Rebound Systems, Inc. and was not selling the Rebound product. so that it should not be included in any suit for patent infringement. Mr. Kanz suggested that, under these circumstances, I should discuss with Matchpoint Industries, Inc. the matter of becoming a distributor for the Matchpoint "Bouncer" product. He told me that even though the name of Unique Sports Products, Inc. appeared on the "Bouncer" label as distributor, Mr. Kennington of Matchpoint Industries, Inc. was actually in charge of distribution, and that he was the person with whom to discuss the matter. I asked Mr. Kanz to have Mr. Kennington contact me in this connection.



## AFFIDAVIT OF JAY MONROE IN OPPOSITION TO MOTION

11. On or about January 27, 1975, Mr. Kennington called me at the Tensor offices in New York, told me that he would like to discuss the matter with me, and suggested that he meet with me in New York at the offices of Tensor Corporation since he planned a trip in the near future to New York and Boston. I did not request him to come to New York, and the conference at the New York Tensor offices was entirely at his suggestion.

12. On January 30, 1975, Mr. Kennington visited the offices of Tensor Corporation in Brooklyn, New York, and discussed the matter of the Matchpoint patent with me. He warned that Matchpoint Industries believed that their patent was a strong one, and would be upheld, and that they intended to litigate on it. He suggested to me that Tensor Corporation should not be on the opposite side of such litigation. Mr. Kennington told me specifically that Matchpoint Industries, Inc. had offered to manufacture and assemble the pressurized container apparatus for Rebound Systems, Inc. and that if Rebound did not accept this proposal, Matchpoint would sue Rebound for infringement of its patent. He further told me that he had met with Mr. Jacobson of Rebound Systems, Inc. and discussed with Mr. Jacobson the possible licensing of the Matchpoint patent to Rebound Systems. He indicated that the granting of such a license was not likely because he intended to make it contingent upon



AFFIDAVIT OF JAY MONROE IN OPPOSITION TO MOTION  
the assembling of the Rebound apparatus by  
Mr. Kennington's company, and that the costs to  
Rebound Systems, Inc. for such assembling would be  
so high that Rebound Systems could not possibly accept  
the proposal.

13. At the meeting of January 30, 1975,  
Mr. Kennington also proposed to me the possibility of  
Tensor Corporation becoming a marketing representative  
of Matchpoint Industries for the selling of the  
"Bouncer" product to the large chain stores such as  
Sears Roebuck and J. C. Penney. During the course of  
this conversation, he asked me many detailed questions  
regarding Tensor's relationship with particular buyers  
for these chains, mentioning many of them by name, which  
demonstrated his intimate knowledge of the marketing  
of the "Bouncer" product. He indicated that he was  
dissatisfied with the ability of Unique Sports Products,  
Inc. to penetrate this market segment, and told me that  
while Unique Sports was handling the marketing, it was  
actually Mr. Kennington who was controlling it. He  
asked me whether Tensor Corporation would be interested  
in distributing the "Bouncer" product to the larger  
chain and department stores to which Tensor already had  
access.

14. I gave to Mr. Kennington the names of  
several of the buyers with whom Tensor Corporation had  
been dealing, and Mr. Kennington told me that he would



AFFIDAVIT OF JAY MONROE IN OPPOSITION TO MOTION

consult with these buyers to determine the ability of Tensor Corporation to sell the pressurizing apparatus to these market sources. After the meeting of January 30, 1975, neither I nor Mr. Kennington followed up the matter discussed.

15. As a result of the continued threat by Matchpoint Industries, Inc. to enforce its patent against Rebound Systems, Inc., and knowing that Tensor Corporation as a distributor of the accused apparatus could be joined in such a suit, I refused to sign a final distributorship agreement with Rebound Systems, Inc. Tensor Corporation has therefore never become a distributor for the Rebound Systems product.

**Further deponent sayeth not.**

(Sworn to by Jay Monroe, October 29, 1975.)

AFFIDAVIT OF ROBERT B. DUBNER IN OPPOSITION TO MOTION.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

REBOUND SYSTEMS, INC.,  
Plaintiff,

vs.

MATCHPOINT INDUSTRIES, INC.  
Defendant.

Civil Action No.  
75 CIV 2303

AFFIDAVIT

ROBERT B. DUBNER, being duly sworn, deposes  
and says:

1. I reside at 40 Dogwood Avenue, Roslyn Harbor,  
New York.

2. I am a member of the Board of Directors of  
Rebound Systems, Inc., the plaintiff in the above action,  
and am authorized to make this affidavit in behalf of the  
corporation. I am personally familiar with the activities  
of Rebound Systems, Inc. and with the facts recited herein.

3. Rebound Systems, Inc. is a New York corporation  
located at 1129 Northern Boulevard, Manhasset, New York, and  
is engaged in the business of manufacturing and selling  
pressurizing pump assemblies for tennis ball cans.

4. In April, 1974, following negotiations between  
Rebound Systems, Inc. and Tensor Corporation, an understanding



## AFFIDAVIT OF ROBERT B. DUBNER IN OPPOSITION TO MOTION

was reached whereby Tensor Corporation was to become the exclusive distributor of the pressurizing pump assemblies of Rebound Systems, Inc. for retail outlets and stores. The product was to be sold under the name "Rebounder," and Rebound Systems, Inc. spent considerable sums in the design and printing of labels to be used on the product, featuring the Tensor Corporation name and the term "Tensor Rebounder." By October, 1974, Rebound Systems, Inc. had advertised the product for sale under the name "Rebound", and Tensor Corporation had also initiated their own marketing promotion for the product under the name "Tensor Rebounder," and advised Rebound Systems, Inc. that it had taken initial orders for the product.

5. In October, 1974, Rebound Systems, Inc. received a letter dated October 21, 1974 by certified mail, return receipt requested, from the attorney for Matchpoint Industries, Inc. (Exhibit 2 annexed to Defendant's Memorandum), which enclosed copies of patent claims which were stated to have been allowed in a patent which would issue in a few months. The letter also stated that the pressurizing pump advertised by Matchpoint Industries, Inc. incorporated the functional design of the Matchpoint "Bouncer" pump, thus indicating that the enclosed claims were regarded as infringed. The letter further stated that Matchpoint Industries, Inc. was the owner of the trademark "Bouncer" and charged that the name "Rebound" was a colorable imitation of the Matchpoint trademark "Bouncer", which claim of ownership, I have recently learned, was a false one.



## AFFIDAVIT OF ROBERT B. DUBNER IN OPPOSITION TO MOTION

6. At this time Rebound Systems, Inc. had already learned from the President of Tensor Corporation that he had received a similar letter from the attorney for Matchpoint Industries, Inc., and he gave us a copy of their letter for the purpose of having our attorneys look into the matter of infringement and validity of the enclosed claims which would be in the patent about to issue. After some further consultation, Rebound Systems, Inc. and Tensor Corporation both agreed to change the name of the product from "Rebound" or "Rebounder" to a different name in order to avoid any possibility of trademark litigation with Matchpoint Industries, Inc. who claimed to own the trademark "Pouncer." The name of the product of Rebound Systems, Inc. has subsequently been changed to "Nu Ball."

7. On December 3, 1974, the attorneys for Rebound Systems, Inc. reported to me that they had completed a search on the subject matter of the patent claims sent by the Matchpoint attorney and had found relevant patents which they felt invalidated all of the claims which Matchpoint Industries, Inc. could possibly assert to be infringed. The attorneys suggested that they would write to the Matchpoint attorney calling his attention to these prior patents so that Matchpoint would have an opportunity to withdraw the obviously invalid claims before their patent issued, and we authorized them to do so.

8. On January 1, 1975, our attorneys advised us that they had received a letter from the Matchpoint attorney



AFFIDAVIT OF ROBERT B. DUBNER IN OPPOSITION TO MOTION stating that the application of Matchpoint Industries, Inc. had issued as a patent, and enclosing a copy of the patent which contained the identical claims which the Matchpoint attorney had previously sent. They read to me the letter in which the Matchpoint attorney disagreed that the prior patents found on the search invalidated the claims of the Matchpoint patent, and in which he asked for a prompt statement of Rebound Systems, Inc.'s intentions both with regard to the Matchpoint patent and the charge of trademark infringement. We instructed our attorneys to answer this letter by advising that Rebound Systems, Inc. was adopting a new name for the product, but was not changing the structure of its pressurizing pump regardless of the implicit threat of suit for infringement of the patent.

9. Several days later I advised the President of Tensor Corporation of the issuance of the Matchpoint patent, and of the fact that the Matchpoint attorney had asserted that the patent claims were valid. Shortly thereafter, on January 7, 1975, in a discussion of the situation with the Tensor officers, we were advised that although Tensor Corporation felt that the issued patent was invalid, they had no desire to become involved in the obviously impending patent litigation with Matchpoint Industries, Inc. We were further advised that Tensor Corporation would therefore not continue as a distributor of our product and that they would not enter a formal distributorship agreement unless our controversy with Matchpoint Industries, Inc. was settled,

AFFIDAVIT OF ROBERT B. DUBNER IN OPPOSITION TO MOTION or unless Rebound Systems, Inc. would enter an indemnity agreement with Tensor Corporation. The terms of the indemnity proposed by Tensor Corporation were too onerous to be accepted by Rebound Systems, Inc.

10. Notwithstanding our continuing conviction that the Matchpoint patent was invalid, in order to retain Tensor Corporation as a distributor for Rebound Systems, Inc., it was decided to attempt to obtain a license under the Matchpoint patent. For this purpose, Bernard Jacobson, Vice President of Rebound Systems, Inc., contacted and met with Mr. David Kennington of Matchpoint Industries, Inc. in New York City to negotiate for the obtaining of a patent license. The attempts proved unsuccessful when Mr. Kennington subsequently advised Mr. Jacobson that Matchpoint Industries, Inc. did not intend to grant any licenses under its patent, and it became obvious that Mr. Kennington's contradictory proposals and discussions were merely an attempt to intimidate Tensor Corporation and Rebound Systems, Inc. and induce them to discontinue the sale of the Rebound product.

11. The foregoing actions on the part of Matchpoint Industries, Inc. directly caused the loss to us of Tensor Corporation as a distributor and the resulting loss of valuable retail outlets, such as Sears Roebuck, J.C. Penney, Herman's retail stores, and other large retailers with whom Tensor Corporation had established business relationships. The sales activities and market penetration of Rebound Systems, Inc. were also set back by at least six months,



AFFIDAVIT OF ROBERT B. DUBNER IN OPPOSITION TO MOTION during which time we were forced to market on our own and attempt to obtain individual sales representatives. This delay resulted in a substantial loss of profit to Rebound Systems, Inc. and a smaller market share.

12. Matchpoint Industries, Inc. and its distributor, Unique Sports Products, Inc. have since engaged in a concerted effort to advise the trade, and particularly prospective customers of Rebound Systems, Inc. that Rebound Systems, Inc. is infringing the Matchpoint patent and that Rebound and its customers are in danger of suit for patent infringement. Unique Sports Products, Inc. has, in fact, falsely advised the trade that it is suing Rebound Systems, Inc. for patent infringement, whereas Unique is not an owner of the Matchpoint patent or a party to the present suit. These misstatements have compelled Rebound Systems, Inc. to enter into indemnity agreements with prospective customers, in which Rebound Systems agrees to defend at its own expense any patent infringement suit brought against the customer and to hold the customer harmless against loss. Such indemnity agreements have been entered with Higbee Company of Cleveland, Ohio, Sports Accessories, Inc. of Silver Spring, Maryland, and Roos-Atkins of San Francisco, California. The aforesaid false statements by Unique have also inhibited the marketing effort of Rebound Systems, Inc. and have undoubtedly caused us to lose prospective customers.

13. Unique Sports Products, Inc. is actively selling the Matchpoint "Bouncer" product in the state of

AFFIDAVIT OF ROBERT B. DUBNER IN OPPOSITION TO MOTION New York, and particularly in New York City. I have seen the Bouncer product displayed in many sporting goods stores in Manhattan, such as Herman's, A. & S. Department Stores, Feron's Sporting Goods Stores, and many others. Unique has a representative in New York who solicits business at sporting good stores and department stores, and has maintained a booth at the trade shows in New York in 1974 and 1975 at which the "Bouncer" product was displayed and orders were taken for its sale. Unique Sports Products, Inc. also sells the "Bouncer" product extensively to the gift store trade through a distributor, Star Case Company of White Plains, New York. The Bouncer product distributed to gift stores by the Star Case Company undoubtedly constitutes at least twenty percent of the total volume of sales of defendant's "Bouncer" product. The "Bouncer" product is also widely advertised in New York. Annexed hereto as Exhibit 1 is an advertisement at page 17 of Tennis Annual 1975, a national publication which is distributed in New York. Annexed as Exhibit 2 is a page from the 1975 Catalog of Feron's Tennis Shops, a retailer having stores in Manhattan, New York. These exhibits are typical of the advertisements of the "Bouncer" product in New York.

14. On September 27 and 28, 1975, while representing Rebound Systems, Inc. at a booth at the Annual Sporting Goods Show in the New York Coliseum, I was told by several sporting goods buyers that representatives of Unique Sports Products, Inc. were claiming that Unique was suing Rebound Systems, Inc. for patent infringement and that it would enjoin Rebound



## AFFIDAVIT OF ROBERT B. DUBNER IN OPPOSITION TO MOTION

from selling its "Nu-Ball" pressurizing pump attachments.

15. At this Sporting Goods Show, on September 28, 1975, while speaking with the sporting goods buyers of Foley's Department Store and a representative of Sports Accessories, Inc., a distributor of our "Nu Ball" product, it was brought to my attention that representatives of Unique Sports Products, Inc. had told all of these persons that Unique was suing Rebound Systems, Inc. At this point I decided to visit the booth of Unique Sports Products, Inc. and discuss the matter with their representatives. At the Unique booth, I spoke to an officer and another representative of Unique Sports Products, Inc. and requested that they discontinue making false statements regarding the legal situation between our companies, that they henceforth conduct the Unique marketing in a proper manner. This officer became quite abusive and told me that he did not care what the technical situation was; that as far as he was concerned Unique was suing Rebound Systems and would have us restrained from selling our "Nu Ball" product, and that he would continue to say what he pleased.

Further deponent sayeth not.

(Sworn to by Robert B. Dubner, November 6, 1975.)



## EXHIBIT 1, ANNEXED TO AFFIDAVIT OF ROBERT B. DUBNER.

perhaps five times that amount. (It was to be televised by CBS at 1 p.m. EST.)

Comedian and man-about-tennis Alan King said: "This is the last time Connors and Laver will appear as friends. We're gonna bill this match as between the Don Rickles of tennis and the Howard Cosell of Australia." Rickles, Cosell, Connors, Laver? ... this is a tennis match?

Actually, leaving out the hyperbole and the hoopla, it promised to be a splendid tennis match. Connors and Laver are probably the two finest left-handers the world has ever seen. The question was, though, how near his peak Laver would be. Connors, coming off a spectacular year in 1974, seemed likely to be in top form. Laver, however, had sat out the last half of the year and would have only a few tournaments to sharpen his game.

Still, he wasn't worried. "I've had lots of tough matches in my time," he said. "I play 'em as they come." As for Connors, he claimed that "I play better under pressure."

Who would win? A case could be made for either player. But that famed Las Vegas sporting seer, Jimmy the Greek, was quoting odds of 3-2 on Connors.

#### The cheerleader

Can family loyalty be carried too far at a tennis match? German pro Hans Pohmann thinks so.

He was playing Ismail El Shafei of Egypt in the finals of the \$50,000 Philippine International in Manila last fall and found himself distracted by loud clapping from the sidelines by El Shafei's wife. So he threatened to kick her out. El Shafei then said that "if he threatens my wife again, I'll be forced to punch him in the nose."


A rattled Pohmann lost the match 7-6, 6-1.

#### What to expect at the '75 Open

While the world may remember 1974 as the year in which both Richard Nixon and Evel Knievel blew it, tennis fans know that the really cosmic event of the year was Forest Hills' farewell to grass. Bending to player demands and hurdling club members' objections in court, the West Side Tennis Club ripped up its emerald greens in the stadium, grandstand and other areas to make way for seven new Har-Tru courts (17 already stood).

The 1975 U.S. Open will be played on the new clay-like surface, to the general delight (with some reserva-

**WHAT**  
**FREE TENNIS BALLS?**



**NOT QUITE BUT THE BOUNCER GIVES YOU THE CLOSEST THING TO IT**

It's like playing with new balls every time.

Don't let tennis balls go flat and ruin your game. Just place tennis balls into the Bouncer and pump up pressure... that's it. The pressure keeps them bouncy.

Put the bounce back in your game with the Bouncer.

Available at leading sporting goods outlets or send a check for \$6.96 plus \$1.06 for handling to:  
**UNIQUE SPORTS PRODUCTS, INC.**  
3303 GARDEN BROOK  
DALLAS, TEXAS 75234  
(214) 243-3064

**DEVOE**  
**MANUFACTURERS**  
**#1 IN THE U.S.A. . . .**

☐ LIGHTING SYSTEMS  
☐ HEATING SYSTEMS  
☐ ATTENDANT CONTROL SYSTEMS

*For* **INDOOR/OUTDOOR TENNIS**

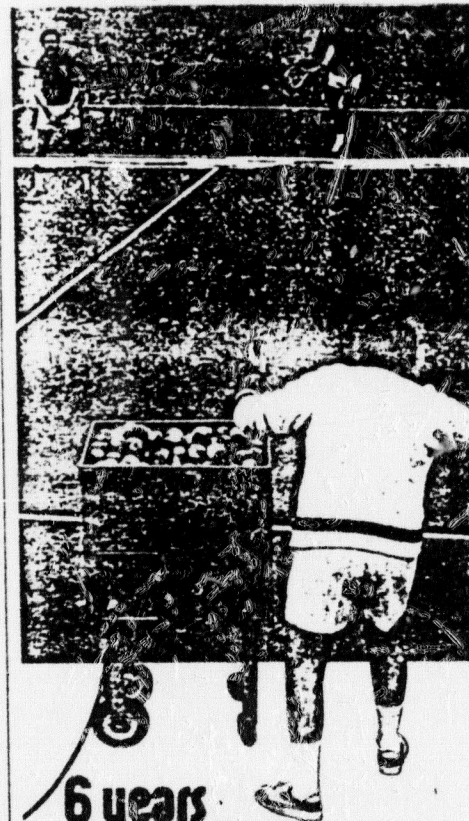
*Our systems facilitate overall economy!*



For further information call or write:  
**DEVOE SYSTEMS CORP.**  
800 Eastern Ave.  
Cortlandt, N. J. 07072  
(201) 935-2300

Continues: Please send me more data on your ☐ INDOOR ☐ OUTDOOR Tennis Environmental System

Name \_\_\_\_\_ Tel \_\_\_\_\_  
Address \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_



## 6 years ago the students at Salamanca bought this machine.

They financed their purchase by collecting "trash & treasures" which turned out to be easy, fun and helpful in developing teamwork. Although in constant use since then, their machine hasn't required a single cent of maintenance expense.

Varsity Tennis Coach Michael L. Ferrara (Salamanca Central High, Salamanca, N.Y.) likes Dudley's easy adjustability, absolute quietness and extreme dependability. The first year the machine was used it helped Salamanca achieve a 14-1 record plus the Section Six Championship. Coach Ferrara mixes old balls with new to help develop quick reflexes and readiness to meet any tennis situation. Greg Banner and Tammy Wogick, shown training here, are two of the seven member co-ed Salamanca team. Tammy is the first girl at Salamanca to play varsity tennis.



Coach Michael L. Ferrara says, "Some of the features I like are its quietness (my students can hear my instructions easily - very important to me); it is easily adjusted; it is extremely dependable." Write for your copy of "What You Should Know Before Buying A Tennis Machine."

**DUDLEY SPORTS**  
29 West 34 St.  
New York, N.Y. 10001



## EXHIBIT 2, ANNEXED TO AFFIDAVIT OF ROBERT B. DUBNER.

Gift strategy: **FERON'S  
GAME AIDS**

Feron's exclusive nylon mesh ball bag.  
24 balls. (shg. wt. ½ lb.) **\$3.50**

Wilson tennis balls. Regular in white or  
v; extra duty, white only. Specify type  
color. Can opener top, plastic cap.  
wt. 1 lb.) can **\$3.25**

Slazenger tennis balls, white or yellow,  
fy color. Can-opener top.  
wt. 1 lb.) can **\$3.25**

(not shown) Dunlop tennis balls, white  
flow. Specify color. (Shg. wt. 1 lb.)

can **\$3.25**  
(not shown) Tretorn tennis balls; white  
flow. Specify color. (Shg. wt. 1 lb.)  
box of 4 **\$4**

Ball 'Chute for easy pick-up. Holds  
16 balls. (Shg. wt. 3 lbs.) **\$11**

Pro-Xerciser® with grip-and-weight  
ome practice. (Shg. wt. 2½ lbs.) **\$16**

Ball Bouncer holds 3 balls, keeps them  
st" under pressure. (Shg. wt. 1 lb.) **\$6**

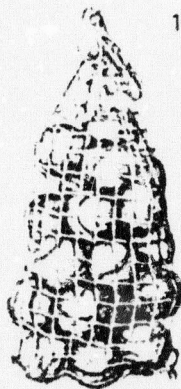
Tremont home stringing machine, with  
hments for stringing wood and most  
racquets. 21x5½x6".

wt. 8½ lbs.) **\$75**

Bongo Board develops balance, speed.  
wood platform. (Shg. wt. 17 lbs.) **\$38**

Tretorn Trainer. Hit at ball attached  
astic cord. (Shg. wt. 2½ lbs.) **\$10**

Set Point Tennis Game provides authen-  
tation at home. (Shg. wt. 2 lbs.) **\$9**

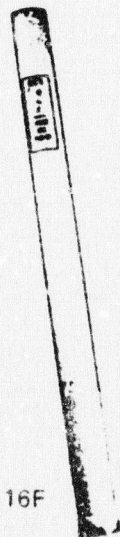


16A

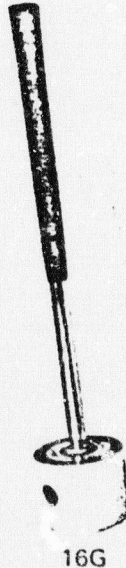
16B



16C



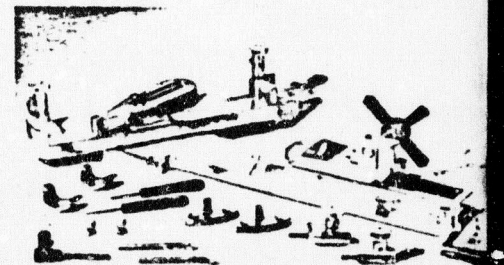
16F



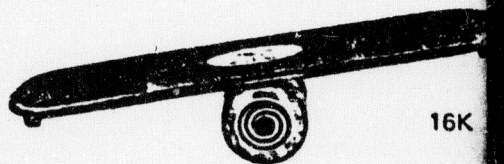
16G



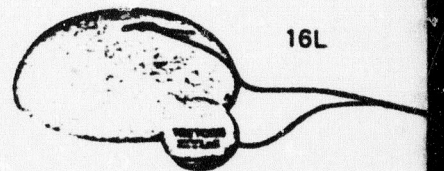
16H



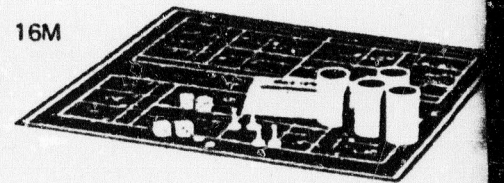
16J



16K



16L



16M



AFFIDAVIT OF BERNARD J. JACOBSON IN OPPOSITION TO MOTION.  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

REBOUND SYSTEMS, INC.,

Plaintiff,

vs.

MATCHPOINT INDUSTRIES, INC.

Defendant.

Civil Action No.  
75 CIV 2303

AFFIDAVIT

BERNARD J. JACOBSON being duly sworn, deposes  
and says:

1. I reside at 303 East 57th Street, New York,  
New York.

2. I am Vice President of Rebound Systems, Inc.,  
the plaintiff in the above-entitled action.

3. Early in January, 1975, I and other officers  
of Rebound Systems, Inc. attended a meeting with the officers  
of Tensor Corporation, at which we were advised that as a  
result of the threat of litigation involving the patent  
of Matchpoint Industries, Inc., Tensor Corporation was with-  
drawing as the distributor of our product.

4. After consultation with our attorneys, it was  
decided that in order to attempt to retain Tensor Corporation  
as a distributor for Rebound Systems, Inc., an effort  
should be made to settle the patent dispute with Matchpoint  
Industries, Inc. I therefore called Mr. John Helms in



## AFFIDAVIT OF BERNARD J. JACOBSON IN OPPOSITION TO MOTION

Dallas, Texas and asked him whether we could meet for the purpose of arriving at some sort of mutual accomodation to avoid a lawsuit between Matchpoint Industries, Inc. and Rebound Systems, Inc., such as by entering a patent license agreement. Mr. Helms told me that he would have to discuss the matter with his associate, Mr. Kennington of Matchpoint Industries, Inc. and that Mr. Kennington was the party with whom I should deal in the matter.

5. Within a few days thereafter, I spoke by telephone with Mr. David Kennington who told me that he was a principal in Matchpoint Industries, Inc. and would discuss the matter of a license with me. He invited me to meet with him in Dallas, Texas, and shortly thereafter I purchased an airline ticket to Dallas for this purpose. Some days later, on Sunday, January 27, 1975, I received a telephone call at my home in New York City from Mr. Kennington who told me that he would be visiting New York in a few days and that it would therefore be unnecessary for me to travel to Texas for our meeting. We arranged to meet in New York City on January 30, 1975 at the Harvard Club. I did not request Mr. Kennington to come to New York, and the meeting in New York City was entirely at his suggestion.

6. On January 30, 1975, I met with Mr. Kennington at the Harvard Club in Manhattan, New York.



## AFFIDAVIT OF BERNARD J. JACOBSON IN OPPOSITION TO MOTION

Mr. Kennington made it clear to me that Matchpoint Industries, Inc. intended to enforce its patent against Rebound Systems, Inc. and the matter of obtaining a license under the patent was discussed. Specific royalty terms under such license were proposed by both myself and Mr. Kennington. Finally Mr. Kennington told me that he was interested in getting dollars from Rebound Systems, Inc. rather than percentages, and offered to manufacture the Rebound pressurizing pump product for Rebound Systems, Inc.

7. Unknown to me at the time, but as I later learned, Mr. Kennington, immediately after our meeting at the Harvard Club, visited the offices of Tensor Corporation in Brooklyn, New York, advised the President that Matchpoint intended to sue Rebound Systems, and attempted to work out a distributorship arrangement with Tensor Corporation.

8. Following the meeting on January 30, 1975, and over a period of three months, several telephone conversations were held by Mr. Kennington and myself, as a result of calls from me to Mr. Kennington in Texas, and from Mr. Kennington to me in New York. In these conversations attempts were made to arrive at a mutually agreeable royalty under a license agreement, and specific royalty figures were discussed, but we found it impossible to arrive at a mutually acceptable figure. In the last of these telephone conversations, Mr. Kennington threatened to proceed immediately with a suit for patent infringement on behalf of Matchpoint Industries, Inc., and in order to keep the negotiations open, I told him



AFFIDAVIT OF BERNARD J. JACOBSON IN OPPOSITION TO MOTION  
that the principal of licensing was established between us  
and only the amount of royalties was in issue, and suggested  
that he send me a copy of a proposed license agreement so  
that I could discuss the terms with my associates in Rebound  
Systems, Inc.

9. In a letter dated May 12, 1975, and sent to  
me at my home in New York City, Mr. Kennington sent me a  
copy of a license agreement which he stated had been granted  
by Matchpoint Industries, Inc. to cover the "Bouncer" product.  
A copy of this letter and enclosed license agreement is annexed  
hereto as "Exhibit A".

10. On May 14, 1975, in a telephone conversation  
with Mr. Kennington, he advised me that he was unaware that  
Rebound Systems, Inc. was seeking a license under the Match-  
point patent and that he did not believe that Matchpoint  
would grant such a license regardless of the royalty payable.  
This was incomprehensible to me in view of the conference  
at the Harvard Club, the subsequent telephone conferences,  
and Mr. Kennington's letter of May 12, 1975. Accordingly,  
I sent Mr. Kennington a letter dated May 15, 1975, confirming  
this last telephone conversation, and advising that Rebound  
Systems, Inc. had no alternative but to turn the matter  
over to its attorneys. A copy of this letter is annexed to  
this affidavit as "Exhibit B." The telephone conversation  
on May 14, 1975 was the last conversation I have held with  
Mr. Kennington.



## AFFIDAVIT OF BERNARD J. JACOBSON IN OPPOSITION TO MOTION

11. Several weeks later I received a letter dated May 30, 1975 from Mr. Kennington, purporting to confirm a telephone conversation on May 29, 1975, although I never spoke to Mr. Kennington on that date. In this letter Mr. Kennington disavowed his previous statement to me, orally and in writing, that Matchpoint Industries, Inc. had granted licenses under its patent. His letter stated that the true fact was that Matchpoint had not licensed any other company, and confirmed Mr. Kennington's previous statement to me that Matchpoint would not grant a license to Rebound Systems, Inc. under any circumstances. A copy of this letter is annexed to this affidavit as "Exhibit C".

Further deponent sayeth not.

(Sworn to by Bernard J. Jacobson, November 6, 1975.)



EXHIBITS A AND C, ANNEXED TO AFFIDAVIT OF BERNARD J.  
JACOBSON.

(Omitted as they are the same as Exhibits 6 and 7, respectively, annexed to the Memorandum in Support of Defendant's Motion reproduced, *supra*, pp. 34a to 39a.)

EXHIBIT B, ANNEXED TO AFFIDAVIT OF BERNARD J. JACOBSON.

REBOUND SYSTEMS, INC.

1129 NORTHERN BOULEVARD  
MANHASSET, NEW YORK 11030

516 365-5250

May 15, 1975

Matchpoint Industries Inc  
c/o Thermalloy Corp.  
P.O. Box 34829  
2021 W. Valley View Lane  
Dallas, Texas 75234

Att: Mr. D. Kennington

Dear Dave;

I was astonished to hear you state on the phone yesterday that you did not know we were seeking a license from you. I was further astonished to hear you say that you did not know whether you would consider licensing us, regarding of the amount of royalty involved.

In view of your lack of serious response to our initiatives for an accomodation, we have no alternative but to turn the matter over to our attorneys in order to seek a conclusion to this matter.

Yours Truly,

Rebound Systems Inc

By: Bernard J. Jacobson

BJJ/jb

RECEIVED  
MAY 19 1975  
EDWARD F. LEVY.



## EXCERPTS FROM TRANSCRIPT OF TESTIMONY.

rdse

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x

REBOUND SYSTEMS, INC., :

Plaintiff, :

-against- : 75 Civ. 2303

MATCHPOINT INDUSTRIES, :

Defendant. :

-----x

February 10, 1976  
4:00 p.m.

BEFORE:

HON. THOMAS P. GRIESA,

District Judge

## APPEARANCES:

LEVY &amp; MALINA, ESOS.

Attorneys for the Plaintiff

BY: EDWARD F. LEVY, ESO.

BERNARD MALINA, ESO.

AMSTER &amp; ROTHSTEIN, ESOS.

Attorneys for the Defendant

BY: JESSE ROTHSTEIN, ESO.

ANTHONY LOCICERO, ESO.

JACK A. KANZ, ESO.

(In open court.)

THE COURT: We had a conference, and I think it was off the record, which took place on January 26th, and that is what has led to the hearing today.

The question, in a nutshell, as I understand it, is whether the defendant Matchpoint had an agent in New York State so that it was engaged in business in New York State, and the name of the alleged agent is Unique Sports Products, Inc.

I called the lawyers together at the January 26th occasion to inquire about the affidavit of J. Monroe, in which he says that the attorney for Matchpoint, Mr. Kanz, and the President of Matchpoint, Mr. Kennington, admitted to him something to the effect that Matchpoint controlled the marketing or distribution of its products, and so forth.

So I suggested to the lawyers that they should take steps to somehow get on the record the facts about what Kanz and Mr. Kennington said, whether there were such admissions or not and what the significance of those admissions would be if there were any.

Now, what do we have today?

MR. ROTHSTEIN: Your Honor, pursuant to the arrangement at that meeting, we have obtained the presence



of Mr. Kennington in this courtroom and have him available for questioning by the plaintiff.

THE COURT: Are you ready to question Mr. Kennington?

MR. LEVY: Yes, I am, your Honor.

THE COURT: Fine.

Mr. Kennington, will you take the stand.

DAVID H. KENNINGTON, called as a witness on behalf of the plaintiff, after having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LEVY:

MR. LEVY: Your Honor, may I inquire before I begin, is this examination restricted only to testimony about what Mr. Kennington told Mr. Monroe at this meeting or may we get into the facts of the relationship?

THE COURT: I think the facts of the relationship, certainly.

Q Mr. Kennington, what is your occupation?

A I am an officer of Matchpoint Industries, Incorporated.

I'm Vice President and also Chairman of the Board.

1 rdse

Kennington - direct

4

2 Q Are you also connected with or engaged in the  
3 management of any other companies besides Matchpoint?

4 A Yes.

5 Q Are you the David Kennington who submitted an  
6 affidavit in this action?

7 A Yes, I am.

8 Q What is the business of Matchpoint Industries,  
9 Incorporated?

10 A Matchpoint is the owner of the proprietary  
11 products rights and the patent on the product called the  
12 Bouncer, which is a tennis ball pressurizer.

13 Q Is that its sole business, the owner of the  
14 patent?

15 A Yes. It also acts as an agent. It purchases  
16 the Bouncers from another company and resells them to a  
17 marketing company.

18 Q Does it act as the agent for the marketing  
19 company?

20 THE COURT: Can you keep your voice up, please?

21 Let me have the answer read.

22 (Record read.)

23 Q You say it acts as an agent. For whom does it  
24 act as an agent?

25 A I'm not sure what you mean when you say agent.



1	rdse	Kennington - direct	5
---	------	---------------------	---

2 THE COURT: You used the term. That's what he  
3 is referring to.

4                   A       It's a company that merely buys and resells pro-  
5       ducts.

6 Q And this product is the Bouncer product that  
7 you have been involved with here?

8 A Yes.

9 THE COURT: When you say "resells to a marketing  
10 company," who is the marketing company?

11 THE WITNESS: It sells to a company called  
12 Unique Sports, Incorporated.

13 MR. LEVY: If your Honor please, I think it  
14 might be about time that the Court became aware of the  
15 product we have been discussing here.

16 Q Mr. Kenninaton, is this object I hold --

17 THE COURT: Why don't you have it marked.

18 MR. LEVY: May I ask the questions?

19 THE COURT: Let's get it marked for identifi-  
20 cation. We will put a tag on it.

xx 21 (Plaintiff's Exhibit 1 is marked for identifi-  
22 cation.)

23 Q Mr. Kennington, is this a sample of the Bouncer  
24 product which Matchpoint Industries deals with?

25 A Yes, it is.

1 rdse

Kennington - direct

6

2 MR. ROTHSTEIN: Excuse me, your Honor, may I  
3 ask both the witness and counsel to keep their voices up?  
4 I'm having difficulty hearing each of them here.

5 THE COURT: Keep your voice up, both of you.

6 Q Mr. Kennington, would I be correct in classifying  
7 this product as a sporting goods article?

8 A Yes, you would.

9 Q Now, any of the other companies with which you  
10 are connected other than Matchpoint Industries, are they  
11 engaged in the manufacture and sale of sporting goods pro-  
12 ducts?

13 A Yes.

14 Q You say some of them are?

15 A Yes, one is.

16 Q Which one is that?

17 A A company called Plastronics, which manufactures  
18 the Rouncer.

19 Q I see, manufactures the Rouser for Matchpoint.

20 A Yes, for Matchpoint.

21 THE COURT: Are you connected with that com-  
22 pany?

23 THE WITNESS: Yes, I am connected with Plas-  
24 tronics, Incorporated.

25 Q Who are the other officers of Matchpoint



1 rdse Kennington - direct

7

2 Industries besides yourself?

3 A John Helms.

4 Q Is he the President?

5 A Yes, he is the President.

6 Q Any other officers?

7 A No.

8 Q Are you and Mr. Helms stockholders in the  
9 company?

10 A Yes.

11 Q Are there any other stockholders?

12 A No.

13 Q Now, does Matchpoint Industries have a place  
14 of business at 13547 Rawhide in Dallas, Texas?

15 A They did at the time, it has since been moved.

16 THE COURT: What do you mean, at the time of  
17 what?

18 THE WITNESS: At the time I suppose that this  
19 action was instituted. It was moved just a couple of months  
20 ago to another location.

21 THE COURT: So until a couple of months ago it  
22 was at Rawhide?

23 THE WITNESS: Yes.

24 THE COURT: What's that address again?

25 THE WITNESS: I don't know the exact address.

rdse

Kennington - direct

8

MR. LEVY: 13547 Rawhide.

THE COURT: Houston?

THE WITNESS: Dallas.

Q Where is Matchpoint Industries located now?

A Located on LBJ Freeway at Josey Lane in Dallas.

Q Up until the time that Matchpoint Industries moved a few months ago, did Matchpoint have any other place of business?

A No.

Q Such as an office or plant?

A No.

Q Any warehouse?

A No.

Q Now, is this address, 13547 Rawhide, also the residence of John Helms?

A Yes, it is.

Q Did Matchpoint Industries maintain any sort of business facility at this address?

A Yes, they did.

Q What type of facility?

A The records of the company.

Q Did it have an office there?

A Yes.

Q One of the rooms of the Helms' house?



1 rdse

Kennington - direct

9

2 A Yes.

3 Q Did it have any manufacturing facilities?

4 A No.

5 Q And do I understand you to say that the only  
6 sort of business that it transacted was the keeping of  
7 records?

8 A Yes. If I may clarify.

9 Purchasing the material from Plastronics, paying  
10 the bills to Plastronics, selling material to Unique  
11 Sports and billing and collecting the monies from Unique  
12 Sports.

13 Also Matchpoint owned the tooling used to  
14 fabricate the Bouncer, the molds and what have you,  
15 production equipment.

16 Q That is the tooling that Plastronics was using?

17 A Yes, was the property of Matchpoint.

18 Q Did Matchpoint have any employees working on  
19 these premises?

20 A No.

21 Q Now, where is the Bouncer product manufactured  
22 by Plastronics? Is that in Dallas also?

23 A Yes, it is in Dallas.

24 Q Is the Plastronics plant nearby to the Match-  
25 point -- former Matchpoint office at Rawhide?



1 rdse

Kennington - direct

10

2 A Would you repeat that question? I'm not  
3 sure I understand.

4 Q Let me put it this way:

5 How far was the Plastonics plant distant from  
6 the Matchpoint office at 13547 Rawhide?

7 A Approximately five miles.

8 Q And was Plastonics the only company making the  
9 product or parts for the product?

10 A Yes.

11 Q Now, did Matchpoint do any assembling of the  
12 product?

13 A No, Matchpoint did no assembling.

14 Q Now, Mr. Kennington, according to your affidavit  
15 Matchpoint was formed and organized as a corporation on  
16 July 13, 1973, is that correct?

17 A I believe those dates are approximately correct.

18 THE COURT: Formed when?

19 MR. LEVY: July 13, 1973.

20 THE WITNESS: I believe that to be correct.  
21 I'm not sure of the exact date.

22 MR. ROTHSTEIN: The affidavit that I have says  
23 July 1st.

24 THE COURT: It's immaterial. July 1973.

25 THE WITNESS: Somewhere along there, yes.



1 rdse

Kennington - direct

11

2 Q Was Matchpoint Industries formed for the purpose  
3 of dealing in the Bouncer product, particularly for that  
4 purpose?

5 A Well, can I ask what you mean by "dealing"?

6 Q You say it does not manufacture and it does  
7 not distribute but that it is sort of a middleman between  
8 the manufacturer and the distributor.

9 A Yes. It was formed with that as the initial  
10 product, yes.

11 Q As the initial product?

12 A Yes.

13 Q Does it have other products?

14 A Not since that time. Not yet.

15 Q Now, according to the supplemental memorandum  
16 which was filed by the defendant Matchpoint in support of  
17 this motion, Unique Sports Products was set up, and I'm  
18 quoting now from the memorandum, "was set up originally  
19 and independently to sell the goods that it purchases from  
20 defendant Matchpoint."

21 Do you follow what I am saying?

22 A Well, they sell products for Matchpoint but  
23 they also sell products from other manufacturers too.  
24 Not solely from Matchpoint, no.

25 Q The question I was going to ask, is that a



1 rdse

Kennington - direct

12

2 correct statement?

3 THE COURT: What are you reading from?

4 MR. LEVY: The supplemental memorandum of the  
5 defendant.

6 Q The question, Mr. Kennington, is was Unique  
7 set up for the purpose of selling the goods from the defend-  
8 ant Matchpoint?

9 MR. ROTHSTEIN: Objection, your Honor. We have  
10 a long prelude, which has got to be confusing for the  
11 witness, if not for the record.

12 THE COURT: Would you show me the page you are  
13 talking about?

14 MR. ROTHSTEIN: I think he is talking about  
15 the top of page 3, the memorandum entitled "Supplemental  
16 Memorandum In Support of Defendant's Motion To Dismiss  
17 Or To Transfer."

18 THE COURT: All right.

19 Are you objecting to the question?

20 MR. ROTHSTEIN: I was objecting to the prelude.  
21 I have no objection to the question per se, but the prelude  
22 says what Mr. Levy said was in some memo that the witness  
23 obviously does not have before him.

24 THE COURT: Just rephrase the question.

25 MR. LEVY: My question to the witness is this:



1 rdse

Kennington - direct

13

2 Q Do you know whether or not Unique Sports  
3 Products was set up for the purpose of -- set up as a  
4 corporation for the purpose of selling the product which you  
5 purchased from Matchpoint?

6 A Unique Sports was in business selling other  
7 products before we approached them to sell the Bouncer for  
8 I don't know how long a period of time, but certainly in  
9 months or even years.

10 Q In other words, it was already established in  
11 business as a distributor?

12 A Yes, it was a going business at the time we  
13 approached them.

14 THE COURT: Who are the principals of Unique,  
15 do you know?

16 THE WITNESS: The principal that we had contact  
17 with was a man named Neil Roush.

18 THE COURT: Neil what?

19 THE WITNESS: Roush, R-o-u-s-h.

20 THE COURT: Where does he live?

21 THE WITNESS: He lives in Dallas. He was  
22 President of Unique Sports.

23 THE COURT: I take it you don't own any stock  
24 in Unique?

25 THE WITNESS: No, we do not. I do not.

rdse

Kennington - direct

14

1  
2 THE COURT: Does Mr. Helms?

3 THE WITNESS: No, he does not.

4 THE COURT: Do you have any interest, bene-  
5 ficial or any interest of any kind in Unique except to  
6 collect for the sales?

7 THE WITNESS: No, we do not.

8 THE COURT: Go ahead.

9 Q Mr. Kennington, had you ever done business with  
10 Unique prior to the time that you entered this agreement  
11 with them on behalf of Matchpoint?

12 A No.

13 Q How did you know this company?

14 A John Helms, who is the other stockholder in  
15 Matchpoint, knew personally Neil Roush and he knew of  
16 Neil Roush's business in selling tennis accessories, and  
17 it was through that contact that the two of them met and  
18 I was introduced to Neil Roush by John Helms.

19 Is that the answer to your question?

20 Q Yes.

21 At the time that you entered the agreement with  
22 Unique, was Unique distributing tennis balls, I think you  
23 said, other sporting goods items on a national basis?

24 A To our knowledge it was. It was represented  
25 as being.

Q Where does Unique have its place of business?



1 rdse

Kennington - direct

15

2 A It is in Dallas.

3 THE COURT: I'm sorry, you understood Unique  
4 distributed tennis balls?

5 THE WITNESS: No, tennis accessories. Tennis  
6 items complementary to the Bouncer but not the same. No  
7 tennis balls.

8 THE COURT: Go ahead.

9 Q How far is Unique distant from the Matchpoint  
10 office at Rawhide, would you say?

11 A I thought I answered that question before.

12 About seven miles. Unique Sports from the  
13 Matchpoint office?

14 Q Right.

15 A About seven miles.

16 Q I think the question before was Plastonics.

17 A I didn't recall you asked that.

18 THE COURT: I don't see what difference it makes.

19 Q How far is Unique from the Plastonics place of  
20 business?

21 A About a half a mile.

22 Q Half a mile from the Plastronics factory where  
23 the Bouncer item is manufactured?

24 A That's correct.

25 Q Now, how do you arrange to supply the product

1 rdse

Kennington - direct

16

2 to Unique when it is ordered by Unique?

3 MR. ROTHSTEIN: Excuse me, I don't object, I  
4 just didn't hear the question.

5 THE COURT: Now, look, everybody keep your voice  
6 up. You just let it drop down to almost a whisper.

7 MR. LEVY: I'm sorry, your Honor.

8 Q Mr. Kennington, how do you arrange to supply  
9 the product to Unique when it is ordered by Unique?

10 A Unique issues a purchase order to Matchpoint  
11 specifying a quantity and a delivery date. The products  
12 are shipped to Unique Sports and an invoice is issued  
13 billing them for the material.

14 Q So the product is shipped directly from Plas-  
15 tronics to Unique, I think you said?

16 A Yes. It is physically shipped directly to  
17 them.

18 Q It does not physically pass through the Match-  
19 point place of business?

20 A That is correct, it does not.

21 Q Has Plastonics ever shipped products directly to  
22 customers rather than to Unique?

23 A No, they have never shipped directly to cus-  
24 tomers, other than to Unique Sports.

25 Q I'm talking, of course, about the Bouncer pro-



Q Have you ever seen products as they were in the  
of being shipped from Plastonics to Unique? Have  
er seen that operation?

Q Are the products contained in cartons when they delivered from Plastronics to Unique?

Q Are they repackaged by Unique upon receipt?

A They are not repackaged, they are sealed.

Q And shipped out?

A Yes, by Unique.

THE COURT: Do you have an agreement to sell exclusively to Unique?

THE WITNESS: Yes.

THE COURT: Is that in writing?

THE WITNESS: Yes, a writing in contract.

THE COURT: Does it have a term?

THE WITNESS: You mean term of payment?

THE COURT: No, time, duration.

THE WITNESS: Yes.

THE COURT: What's the duration?

THE WITNESS: The term is July of 1975.

rdse

THE COURT: You mean it ended in July of '75?

THE WITNESS: Yes, and since has been extended.

THE COURT: And it's extended to what?

THE WITNESS: It's an open-ended extension.

THE COURT: All right.

Q Mr. Kennington, along those lines, paragraph 2 of the distribution agreement which you have with Unique says that Unique is granted the exclusive right and license to market and sell at retail the Bouncer product.

Now, could you explain what the words "at retail" means in connection with this exclusive license?

A I'm not sure what the term retail -- the legal definition of it, but they have the right to sell to customers, to sell the Bouncer, retail, wholesale or what have you.

Q That is to sell to anybody?

A Yes.

Q Retailers as well as wholesalers?

A Yes.

Q And also according to the agreement the distributor Unique shall have no right to grant sublicenses without the written approval of the manufacturer, Matchpoint.

Now, have you ever given written approval to the granting of a sublicense by Unique?



1 rdse

Kennington - direct

19

2 A No, we have not.

3 Q Did you ever give oral approval to sublicense?

4 A No.

5 Q Now, are you familiar with the Starcase Company  
6 of White Plains, New York?

7 A Starcase?

8 Q Starcase Company?

9 A No, I am not.

10 Q Never heard of the company?

11 A No.

12 Q Would you know if there is an exclusive distri-  
13 butor of the Bouncer product for the gift trade?

14 A Would I know?

15 Q Yes.

16 A No, I would have no way of knowing.

17 Q You have no idea?

18 A No.

19 Q If I were to tell you that there is a Starcase  
20 Company in White Plains, New York who is the exclusive  
21 distributor of the Bouncer product to the gift trade, would  
22 this be a surprise to you?

23 A Not particularly, no.

24 Q It would not be a surprise?

25 A No, because this would be something that would

1 rdse

Kennington - direct

20

2 be granted, I would assume, by Unique Sports.

3 Q But you had never given your approval to any  
4 such grant, have you?

5 A In my opinion it would not be necessary for us  
6 to give approval.

7 Q Isn't Unique supposed to be the exclusive  
8 distributor?

9 A Yes, they are the exclusive distributor. They  
10 are our exclusive marketing outlet and they can make what-  
11 ever agreements they wish beyond this.

12 Q In other words, they can appoint other distri-  
13 butors?

14 A Subdistributors, and to my knowledge they do  
15 appoint subdistributors.

16 Q Now, again, getting back to the distributorship  
17 agreement, it designates a fixed price at which Matchpoint  
18 will sell to Unique during the years 1973 and 1974 and  
19 states that this price is based on the retail selling price  
20 of a certain amount which was blanked out of the copy that  
21 we had.

22 I presume there was an amount there; is that  
23 correct?

24 A Yes, that is correct.

25 Q Who determines this retail selling price?



1 rdse

Kennington - direct

21

2 A Who determined the retail selling price?

3 Q Yes, the retail selling price upon which your  
4 price was based?

5 A There was a mutual agreement. I presume that  
6 Unique Sports determined the amount of the selling price.

7 Q Do you remember if you had anything to do with  
8 it?

9 A Not that I can recall. There were some dis-  
10 cussions on the subject but I don't recall the specific  
11 discussions.

12 Q Now, the agreement also specifies that if the  
13 retail price of the product is increased, that Matchpoint's  
14 price to Unique shall also be increased by a certain per-  
15 centage.

16 As the retail price is lowered, that Matchpoint  
17 price would be correspondingly lowered, is that correct?

18 A Yes.

19 Q Was in fact the retail price of the product  
20 ever increased or decreased during the term of this agree-  
21 ment?

22 A Unique Sports increased the price of the Bouncer  
23 during that period of time, yes.

24 Q And was Matchpoint's price to Unique correspond-  
25 ingly increased?

rdse

Kennington - direct

22

1           A     That part of the contract was amended due to  
2           some changes that occurred after the initial contract was  
3           prepared. It was amended to have the sale price from Match-  
4           point to Unique Sports based on our cost rather than a per-  
5           centage, because of some changes that were made in the  
6           product design, packaging requirements and some operations  
7           that had to be added that Unique Sports was initially going  
8           to do themselves.  
9

10          Q     Well, I don't believe that was an answer to the  
11          question. The question was when the retail price of the  
12          product was increased by Unique, as you say it was, was  
13          Matchpoint's price to Unique correspondingly increased?

14          A     It was increased, yes, but not correspondingly.

15          Q     It was increased.

16                 Now, paragraph 4 of the agreement states, and I  
17          will quote it, "It is the intent of this part of the agree-  
18          ment to promote a participating type of venture between the  
19          parties involved and encourage the parties to pursue inno-  
20          vating marketing techniques to the mutual benefit of both  
21          parties."

22                 What does that provision mean?

23          A     Could you read that again for me, please?

24          Q     It reads, "It is the intent of the agreement to  
25          promote a participating type of venture between the parties



1 rdse

Kennington - direct

23

2 involved and encourage the parties to pursue innovating  
3 marketing techniques to the mutual benefit of both parties."

4 A The intent was for Matchpoint to develop new  
5 and innovative products and for Unique Sports to sell these  
6 new and innovative products.

7 Q How about innovating marketing techniques, which  
8 the agreement talks about?

9 A I don't recall what the intent was on that  
10 phrase.

11 Q Well, have you ever participated with Unique  
12 in pursuing innovative marketing techniques?

13 A No.

14 Q Have you ever made any suggestions to Unique  
15 about marketing techniques they might use?

16 A Well, suggestions only in the sense of -- well,  
17 just suggestions, that was all, in that context. But that  
18 is not an order, a suggestion.

19 Q Do you ever have conferences with Unique on  
20 marketing of the product?

21 A I'm not sure what you mean.

22 Q Well, do you ever sit down with Unique people  
23 and discuss marketing of the product such as where the  
24 product should be marketed, what markets to try to hit, and  
25 so forth?

1 rdse

Kennington - direct

24

2 A We sit down with them and they bring us up to  
3 date on what they are doing on the marketing of the product,  
4 yes.

5 Q Do you make any contributions?

6 A We make comments and suggestions.

7 Q Now, Mr. Kennington, do you recall having spoken  
8 to a Mr. Stanley Jarrett of the Tensor Corporation at the  
9 Sporting Goods Show in Houston, Texas in January of 1975?

10 A Yes, I did.

11 THE COURT: January, 1975?

12 MR. LEVY: January, 1975, yes, sir.

13 THE COURT: Is this referred to in the affi-  
14 davit?

15 MR. LEVY: This is Mr. Monroe's affidavit.

16 THE COURT: What paragraph, please?

17 MR. LEVY: Paragraph 9, your Honor.

18 Q Did you tell Mr. Jarrett that Matchpoint  
19 Industries intended to enforce its patent against Rebound  
20 Systems, Inc. and that the Tensor Corporation would be  
21 involved in such litigation if they were a distributor?

22 A No.

23 Q Did you tell Mr. Jarrett that Matchpoint Indus-  
24 tries might consider using Tensor Corporation as a distribu-  
25 tor for its Bouncer merchandise?



1 rdse Kennington - direct 25

2 MR. ROTHSTEIN: Objection, your Honor. We are  
3 now back into that part of the subject matter which I under-  
4 stood was closed and terminated.

5 THE COURT: Well, this is just background.

6 MR. ROTHSTEIN: If it is, then I don't object  
7 on that basis.

8 THE COURT: What is the last question and  
9 answer before the objection?

10 (Record read.)

11 MR. ROTHSTEIN: I specifically withdraw my  
12 objection. I did not properly hear it. Excuse me.

13 THE COURT: What's the answer?

14 THE WITNESS: I have forgotten the question.

15 (Record read.)

16 A Yes, I did, to the best of my knowledge, the  
17 best of my recollection.

18 Q Would you explain how you could have used --  
19 how Matchpoint Industries could have used Tensor Corpora-  
20 tion as a distributor in view of its exclusive license  
21 agreement with Unique?

22 A Well, we had an exclusive license with Unique  
23 which was due to expire on July 1st, 1975. Any discussions  
24 that were held with Mr. Jarrett were contingent upon after  
25 July 1st, after the exclusive agreement expired.

rdse

Kennington - direct

26

1

2

Q Well, did you tell Mr. Jarrett that?

3

A Yes, I did.

4

Q About the date?

5

A Yes.

6

Q Now, what were you doing at this trade show in

7

Houston?

8

A Visiting and seeing the show itself.

9

Q This was a sporting goods show?

10

A Yes, a sporting goods show.

11

Q Were you attending the show -- let me put it this

12

way:

13

Were you at the Unique booth? Did Unique

14

have a booth at the show?

15

A Unique had a booth at the show, yes.

16

Q Were you at the booth with Unique?

17

A I visited with Unique at the booth, yes.

18

Q Were you registered in the show at the Unique

19

booth?

20

A No.

21

Q Have you attended at other sporting goods shows?

22

A Yes.

23

Q When did you attend these? Can you mention

24

some?

25

A There are sporting goods shows every January and



rdse

Kennington - direct

27

attended several of these.

Q Have you attended any sporting goods shows in New York?

A No.

Q Did you just attend a sporting goods show in Chicago?

A Yes, I did.

Q Was this on last Thursday, February 5th?

A Yes.

Q What were you doing at this sporting goods show?

A Visiting the show.

Q How long did you stay at the show?

A Approximately a half a day.

Q Did you spend any time at the booth of Unique?

A Yes, I spent time at the booth.

Q Did you visit the booth of Rebound Systems?

A Yes.

Q With some principals from Unique?

A Yes, that's correct.

Q Were you registered at the Unique booth?

A I'm not sure what you mean by "registered."

Q Well, how did you get into the show?

A We registered and went in, but we were not

rdse

Kennington - direct

28

1 registered at the Unique booth.

2 Q Did you register under the Unique name?

3 A No, Matchpoint Industries.

4 Q Were you wearing an identification badge with  
5 the name of Unique Sports Products?

6 A Yes, I was.

7 Q And you got this badge having registered as  
8 Matchpoint Industries?

9 A I think the badge read Unique Sports, yes.

10 Q The badge?

11 A Yes.

12 Q I think we established that.

13 A Pardon?

14 Q I think we just established that the badge  
15 said Unique Sports. The question is how did you get the  
16 badge if you registered as Matchpoint?

17 A They typed it up that way. Frankly we got a  
18 free admission if we used an exhibitor's badge.

19 Q Did you do any work together at the Unique  
20 booth, such as talking to buyers, prospective customers,  
21 and so forth?

22 A I was introduced and said hello to some repre-  
23 sentatives that came through.

24 Q Did you do any selling of the product?

25



1 rdse

Kennington - direct

29

2 A No.

3 Q Now, according to your affidavit on January 24,  
4 1975, you were advised by your attorney, Jack Kanz, that  
5 J. Monroe, the President of Tensor Corporation, had called  
6 Mr. Kanz, is that correct?

7 A Well, I was not advised. Mr. Helms was advised  
8 of this.

9 THE COURT: Are you referring to paragraph  
10 what?

11 MR. LEVY: Paragraph 14 of the Kennington  
12 affidavit.

13 THE COURT: Of the Kennington affidavit?

14 MR. LEVY: Yes.

15 A Can you read that to me, please.

16 Q The affidavit says, this being your affidavit,  
17 "On or about January 24, 1975, I was advised by my attorney,  
18 Jack A. Kanz, that Mr. J. Monroe, President of Tensor  
19 Corporation, had called Mr. Kanz on that date and requested  
20 that I call Mr. Monroe."

21 A I presume that was subsequent to the show. Yes,  
22 I was advised.

23 Q Now, what did Mr. Kanz tell you about this con-  
24 versation, about the content of the conversation?

25 A Well, to the effect that Mr. Monroe wished to

1 rdse

Kennington - direct

30

2 talk to us about the Bouncer.

3 Q Did Mr. Kanz tell you that Mr. Monroe had told  
4 Mr. Kanz that Tensor Corporation was not a Rebound distri-  
5 butor and was not selling the Rebound products, so it should  
6 not be sued?

7 THE COURT: Read the question, Mr. Reporter.

8 (Record read.)

9 A I don't recall. I don't recall that.

10 Q Did Mr. Kanz, in connection with this telephone  
11 conversation, did Mr. Kanz inform you that he, Mr. Kanz,  
12 had suggested to Mr. Monroe that he should discuss with  
13 Matchpoint Industries the matter of Tensor becoming a  
14 Matchpoint distributor?

15 A I don't recall but probably so.

16 Q Well, had you previously discussed with Mr. Kanz  
17 the matter of Tensor becoming a distributor for Matchpoint?

18 A Either myself or Mr. Helms had discussed this  
19 with Mr. Kanz.

20 Q So that Mr. Kanz could have mentioned that to  
21 Mr. Monroe?

22 A Could have. I just couldn't recall the details  
23 of that conversation.

24 THE COURT: Now, we have been at this almost an  
25 hour. I don't want to cut you off, but the main reason that



1 rdse

Kennington - direct

31

2 we asked Mr. Kennington to come here was to explain these  
3 references in the Monroe affidavit indicating that Kanz and  
4 Kennington had said something to Tensor about controlling  
5 the distribution.

6 Now, what I think he is telling us is there were  
7 discussions with Tensor about Tensor becoming a distributor;  
8 right?

9 THE WITNESS: Yes.

10 THE COURT: You are saying as far as any control  
11 of distribution, and so forth, you were referring to the  
12 possibility of terminating the arrangement with Unique as  
13 of the stated date of July 1975, right?

14 THE WITNESS: Yes, that's right. The contract  
15 expired.

16 THE COURT: That's the context you were talking  
17 to them about?

18 THE WITNESS: Yes.

19 THE COURT: Frankly, Mr. Levy, that's what I  
20 wondered about, and maybe it should have been obvious, but  
21 I wanted to resolve any ambiguity about these statements.

22 I don't think we have to go just on and on and  
23 on. Most of this is covered in the papers, isn't it?

24 MR. LEVY: Yes, but I thought that this was  
25 what your Honor wanted.

rdse

Kennington - direct

32

THE COURT: I am not trying to express any irritation at all, but I think that, frankly, the main thing I wanted to have resolved, so it wasn't left hanging, was the meaning of these few paragraphs in the Monroe affidavit. That was my main purpose.

MR. LEVY: Your Honor has anticipated my very next question. I was just about to get to it.

THE COURT: You go ahead.

Q Mr. Kennington, in connection with this telephone conversation on January 24, did Mr. Kanz inform you that he had told Mr. Monroe that even though the name of Unique Sports Products appeared on the Bouncer label as a distributor, that you, Mr. Kennington, were actually in charge of distribution and that you were the person with whom to discuss a possible Tensor distributorship?

A No.

THE COURT: This refers to paragraph what?

MR. LEVY: Paragraph 10 of the Monroe affidavit.

Q You were in fact, however, the person with whom to discuss a Tensor distributorship, were you not?

THE COURT: Could I interrupt you?

Read the last question and answer, Mr. Reporter.

(Record read.)

Q Mr. Kennington, did you place a phone call to



1 rdse

Kennington - direct

33

2 Mr. Monroe shortly thereafter on January 27, 1975?

3 A Yes, I did.

4 Q What was the substance of that telephone conver-  
5 sation?

6 A To make an appointment to see him on a trip I  
7 was making to the East Coast.

8 Q Did you tell Mr. Monroe that you would see him  
9 at his office?

10 A I told him I was planning to make a trip to the  
11 East Coast and would like to talk to him.

12 Q You would like to talk to him?

13 A Well, he had indicated through Mr. Kanz that he  
14 wanted to talk to someone from Matchpoint Industries, to  
15 the best of my recollection, and I was coming up to the  
16 East Coast anyway.

17 Q Did you have any idea what the two of you would  
18 talk about?

19 A He had indicated he wanted to discuss distribution  
20 of the Bouncer.

21 THE COURT: And did you talk to him in New York?

22 THE WITNESS: Yes, I talked to him out in  
23 Brooklyn, at his office.

24 THE COURT: What was the upshot of that?

25 THE WITNESS: Well, it was sort of an explora-

THE COURT: Just point it out to me. You don't have to argue with the witness about it.



rdse

Kennington - direct

35

MR. LEVY: That is paragraph 6, the second page of the paragraph.

I withdraw the question.

Q During this meeting, Mr. Kennington, did you discuss with the Tensor Corporation their marketing connections such as large chain stores, and so forth?

A Yes, I did.

Q And did you suggest to Mr. Monroe the possibility of Tensor becoming a marketing representative for Matchpoint in these areas?

A The possibility when the contract with Unique Sports expired, yes.

Q During the conversation did you ask Mr. Monroe detailed questions regarding Tensor's relationship with part ar buyers for large chain stores?

A I asked him about relationship with the large chains. I don't recall particular buyers with those chain stores.

Q Do you recall mentioning particular buyers of chain stores by name?

A There was only one mentioned by name and that was a particular buyer from Sears, Roebuck.

Q This was a sporting goods buyer?

A Yes.

rdse

Kennington - direct

36

1

2

Q And how did you know the name of this buyer?

3

4

5

6

7

8

9

A When Sears made the contract with Unique Sports to distribute the Bouncer through the Sears chain, they sent their buyer down from Chicago to personally inspect the facilities of Unique Sports. They wanted to see the manufacturing facilities, so they were taken to the manufacturing facilities and I met the buyer at the manufacturing facilities.

10

11

12

13

Q During the course of the conference with Mr. Monroe, did you tell him that while Unique was handling the marketing of the Bouncer product, that you were actually the person who controlled the marketing?

14

15

16

17

A No.

18

19

20

21

Q Did Mr. Monroe give you the names of several sporting goods buyers with whom Tensor Corporation had been dealing?

A I believe he did.

22

23

24

25

Q For what purpose did he give you these names?

A He gave me these names as a possibility to check out their performance, Tensor's performance.

Q Do you remember the names of the companies that these buyers represented?

A No, I don't.

Q Did you tell Mr. Monroe that you would consult



1 rdse

Kennington - direct

37

2 with these buyers to determine the Tensor performance?

3 THE COURT: Can't we cut this short?

4 How much more do you have? I think we are  
5 getting a little over elaborate.

6 MR. LEVY: Not very much, your Honor.

7 THE COURT: All right.

8 THE WITNESS: I don't recall your question.

9 Q Did you tell Mr. Monroe that you would consult  
10 with these buyers in order to determine the Tensor perfor-  
11 mance or ability to perform?

12 A I told him I would think over our conversation  
13 and if we wanted to do anything further, then we would con-  
14 sult with these buyers, yes.

15 Q Did you in fact thereafter consult with any of  
16 these buyers?

17 A No, I did not.

18 Q Did you submit the name of any of these buyers  
19 to Unique?

20 A No, I did not.

21 Q Now, have you or anybody associated with Match-  
22 point ever participated in the sale of a Bouncer product to  
23 retail outlets?

24 A No.

25 Q Have you ever cooperated with Unique in the sale

1 rdse

Kennington - direct

38

2 of the Bouncer product?

3 A No, we have not.

4 Q Prior to your meeting with Mr. Monroe and Mr.  
5 Jacobson on January 30, 1975, had you ever visited New York  
6 State before?

7 MR. ROTHSTEIN: Visited what?

8 MR. LEVY: New York, New York State.

9 A You mean had I been in New York prior to this?

10 Q Yes.

11 A Yes, yes, many times.

12 Q On how many occasions?

13 A Oh, at least a dozen.

14 Q Have you ever visited retail stores in New York  
15 which carry sporting goods items?

16 A You mean as a customer?

17 Q Any purpose.

18 A I have been in stores that carry sporting goods  
19 items.

20 Q Have you ever visited retail stores in New York  
21 for the purpose of seeing the Bouncer product on display?

22 A I have been by the stores to see if they had  
23 Bouncer products on display, yes, yes.

24 Q You say you have?

25 A Yes.



rdse

Kennington - direct

39

Q Have you ever discussed with the owners or employees of these stores, the sporting goods stores in New York, the matter of their selling the Bouncer product?

A No, I have not.

Q Now, do you know of a Medco Catalog Showrooms in Overland Park, Kansas?

A No.

Q Never heard of that company?

A No.

Q Do you know who Mr. Harold Silver is?

A I don't think so.

THE COURT: Keep your voice up.

THE WITNESS: No, I do not know a Mr. Harold Silver.

Q Are you aware of the fact that the Bouncer product is sold in stores in New York?

A I have never seen any sold but, yes, I am aware they are sold there. I have been told this.

Q Do you get any figures from this from Unique?

A No.

Q Could you tell us approximately the percentage of the total output of the Bouncer product which is sold in New York?

A No. No idea.

rdse

Kennington - direct

40

Q Are you aware that Unique Sports Products has been advising the trade that it is suing Rebound Systems?

A No.

Q Never heard that?

A No.

Q Have you received any of the papers that have been filed in this case?

THE COURT: In what case?

A I'm not sure what happens.

MR. LEVY: In this lawsuit, in this motion.

A I have seen an affidavit and I have seen copies of the papers.

Q Have you seen copies of affidavits that have been filed by other parties, Mr. Monroe, and so forth.

A I read Mr. Monroe's affidavit, yes.

Q Did you read Mr. Dubner's affidavit?

A No. I don't know him.

MR. LEVY: Your Honor, I believe this is the end of my examination.

May I have a moment?

THE COURT: Yes.

(Pause.)

THE COURT: Do you have anything else?

MR. LEVY: If your Honor please, one more ques-



1 rdse

Kennington - direct

41

2 tion.

3 BY MR. LEVY:

4 Q Mr. Kennington, I believe you mentioned before  
5 that Unique sells other products besides the Bouncer pro-  
6 duct; correct?

7 A Yes.

8 Q What percentage of Unique's total sales would  
9 you say comprises the Bouncer product?

10 A Oh, I would guess around 60 to 70 percent.

11 MR. LEVY: Thank you.

12 THE COURT: Any cross examination?

13 MR. ROTHSTEIN: No, your Honor.

14 THE COURT: Any further testimony?

15 MR. LEVY: No, your Honor.

16 THE COURT: You may step down.

17 Can we just review quickly the points on the  
18 motion?

19 The claim is Matchpoint was doing business under  
20 the Section 301, right?

21 MR. LEVY: Yes.

22 THE COURT: Just your points. And there was a  
23 transaction of business under 302 -- just refresh my memory.  
24 What sections do you rely on?

25 MR. LEVY: Section 302. 301 is combined with

1 rdse

53

2 Here are the claims. I'm giving them to you now.  
3 My patent hadn't issued but I'm giving them to you now so  
4 I hope we can avoid patents in the future. Why don't you  
5 try another tradename because Rebounder is awfully close to  
6 Bouncer for a competitive product.

7 We can reopen the record and examine Mr. Kanz  
8 as to what his intent was, but I don't know if that is one  
9 we can probe here because I don't know what the attorney-  
10 client privilege is because I haven't considered it. But  
11 the intent that speaks from this document is that the intent  
12 is an attempt to have the plaintiff here not infringe upon  
13 the rights of the patentee and not infringe the trademark  
14 Bouncer by using the trademark Rebounder.

15 THE COURT: Look, did Mr. Kennington testify -- was  
16 he asked about whether he threatened litigation in the  
17 January 30 meeting? I don't know whether he was.

18 MR. ROTHSTEIN: I don't believe he was asked that  
19 specific question.

20 THE COURT: You are still under oath, Mr. Kennington.  
21 I will just ask you, did you talk with Mr. Monroe  
22 about the patent rights or litigation at the January 30, 1975  
23 meeting?

24 THE WITNESS: I merely told him that a patent had  
25 been granted to Matchpoint.



1 rdse

2 THE COURT: What did you say about that?

3 THE WITNESS: I merely informed him that the  
4 patent had been granted. We intended to enforce the patent.  
5 That was basically it. I wasn't in a position to know  
6 whether it infringed or not.

7 THE COURT: What did you say to him? You intended  
8 to enforce it?

9 THE WITNESS: Yes, we intended to enforce the  
10 patent that had been granted to Matchpoint.

11 THE COURT: Did you say you had met with Mr.  
12 Jacobson?

13 THE WITNESS: Yes, I told him I met with him.

14 THE COURT: Now, you did meet with Mr. Jacobson,  
15 right?

16 THE WITNESS: Yes, I did.

17 THE COURT: What did you say to Mr. Jacobson?

18 THE WITNESS: Basically the same thing, that  
19 we intended to enforce the patent. Mr. Jacobson was  
20 inquiring as to whether he could obtain a license under  
21 Matchpoint patent.

22 THE COURT: And you said that you intended to  
23 enforce your patent rights, right?

24 THE WITNESS: Yes, we intended to enforce the  
25 patent.

1 rdse

2 MR. ROTHSTEIN: May I ask the witness a ques-  
3 tion, your Honor?

4 THE COURT: Yes..

5 MR. ROTHSTEIN: Did you exclude the possibility  
6 of granting Rebound a patent license?

7 THE WITNESS: We considered the possibility and  
8 discussed it in generalities with Mr. Jacobson.

9 THE COURT: Look, I think this: If after some  
10 communications or conferences a plaintiff like Rebound just  
11 completely jumps the gun and for no good reason whatever  
12 brings a declaratory judgment action in New York, and I don't  
13 see why they have the right to drag an out of state defend-  
14 ant here on the basis of kind of a mirage, and unreasonable  
15 view of the possibility of claim or suit, I think that's  
16 what you are getting at, isn't it?

17 MR. ROTHSTEIN: Yes.

18 THE COURT: But I think that if someone like  
19 Matchpoint comes to New York and says they are going to  
20 enforce their patent rights and write letters of the kind we  
21 have in these October 21 and 29, '74 letters, certified  
22 mail, that is just not idle chatter and it would seem to me  
23 it raises the issue, and it is not just kind of a frivolous  
24 problem when they sue to get a declaration of their rights.

25 The question is whether it goes in Texas or



1 rdse

56

2 New York.

3 Now, I think it is kind of a close question. I  
4 think it is maybe not quite in line with any authority pre-  
5 cisely, but if it is true that somebody, by coming to New  
6 York and threatening suit, if that is true as a matter of  
7 law, if that is enough to give jurisdiction in New York,  
8 then I really think that there is only the most subtle dif-  
9 ferences between that and what happened here. I just don't  
10 think we cut it all that fine.

11 Now, I think this business about the distributor-  
12 ship, I don't think Unique was any agent and I just hold that  
13 right now.

14 But this other thing is much more serious.

15 MR. ROTHSTEIN: May I speak to that?

16 THE COURT: Yes.

17 MR. ROTHSTEIN: To the extent that there was  
18 anything official that we can know because it is in the  
19 record, it is on these documents. No documents obviously  
20 were written from Dallas, and they say what they say. We  
21 don't have any arguments about that. The New York meetings  
22 were testified to as being as a result of an invitation to  
23 discussion to discuss distribution agreement and license  
24 agreement. A holding by your Honor that this is now a  
25 New York matter means that any time anybody wants to make sure

OPINION AND ORDER.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----	-X	
	:	
REBOUND SYSTEMS, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	75 Civ. 2303
	:	
MATCHPOINT INDUSTRIES, INC.,	:	<u>OPINION</u>
	:	
Defendant.	:	
-----	-X	

GRIESA, J.

Matchpoint has moved (1) to dismiss the complaint for lack of personal jurisdiction, (2) to dismiss the complaint for improper venue, (3) to transfer the action to the Northern District of Texas on the ground that venue would correctly lie there, and (4) to transfer the action to the Northern District of Texas as the more convenient forum.

The action is dismissed for lack of personal jurisdiction. It is unnecessary to discuss the other points raised by defendant Matchpoint.



## OPINION AND ORDER

The complaint herein asserts two causes of action. The first seeks a declaratory judgment to the effect that Matchpoint's patent is invalid and not infringed by Rebound. The second is for unfair competition.

Rebound is a New York corporation with offices in Manhasset, New York. It is in the business of manufacturing and selling pressurizing pump assemblies for tennis ball cans. Matchpoint is a Texas corporation with offices in Dallas. It owns an asserted patent for such a pressurizing device, and manufactures these devices through a subcontractor. Matchpoint sells all of its devices to an independent company called Unique Sports Products, Inc. Unique in turn distributes these devices to retail stores and possibly through other channels.

The present action arises from the fact that in late 1974 and early 1975 Matchpoint communicated with Rebound, claiming possible violation of Matchpoint's patent and trademark rights by Rebound. Matchpoint also communicated with a company known as

## OPINION AND ORDER

Tensor Corporation, located in Brooklyn, New York, which was preparing to be the distributor of Rebound's device.

In this action, Rebound seeks to have a declaration of invalidity or non-infringement of the patent on Matchpoint's device. Rebound also claims that Matchpoint engaged in unfair competition resulting, among other things, in Tensor's withdrawal as a potential distributor for Rebound.

The summons and complaint were served on Matchpoint in Texas.

Rebound asserts that jurisdiction over Matchpoint exists because Matchpoint is doing business in New York. C.P.L.R. § 301. Rebound also invokes the New York long-arm statute, and contends that Matchpoint transacted business within New York, in person or through an agent, giving rise to the causes of action. C.P.L.R. § 302(a)(1). In the alternative, Rebound contends that Matchpoint committed a tortious act within New York. C.P.L.R. § 302(a)(2).



## OPINION AND ORDER

I find that Matchpoint is not doing business in New York. It has no office in New York, and conducts no activities here. A question has been raised as to whether Unique, which concededly does business in New York, is an agent of Matchpoint. I find that the relationship between Matchpoint and Unique is solely one of seller and buyer, and that Unique is in no sense an agent of Matchpoint. Therefore jurisdiction cannot be predicated upon C.P.L.R. § 301.

I also find that the activities of Unique in New York did not constitute the transacting of business, through an agent, by Matchpoint within the meaning of C.P.L.R. 302(a)(1). However, Rebound asserts that Matchpoint itself carried out certain activities in New York which amounted to the transacting of business, or amounted to the commission of a tortious act. The relevant facts are as follows.

In late October 1974 Matchpoint's attorney in Dallas addressed letters to Rebound and Tensor, noting that Matchpoint produced the "Bouncer" tennis

## OPINION AND ORDER

ball pressure device, and that Rebound and Tensor were apparently advertising a device under the name of "Rebounder." The letters enclosed certain patent claims of Matchpoint, saying that such claims had been allowed. The letters asserted that the mark "Rebounder" was an imitation of the mark "Bouncer" and asked that Rebound and Tensor refrain from using "Rebounder."

In December 1974 and January 1975 there was an exchange of correspondence between Rebound's attorney in New York and Matchpoint's attorney in Dallas arguing about the validity of the Matchpoint patent claims and about the claim of trademark infringement. No resolution of the patent problem was reached. However, Rebound agreed to change the trade name of its product.

In early January 1975 Tensor notified Rebound that Tensor would not conclude a distribution agreement with Rebound unless and until the patent controversy between Rebound and Matchpoint was resolved or Rebound agreed to indemnify Tensor for any liability. Later that month the president of Tensor, Jay Monroe, called the attorney for Matchpoint to inquire about Tensor becoming a distributor for Matchpoint. At



## OPINION AND ORDER

about the same time the vice president of Rebound, Bernard Jacobson, called the vice president of Matchpoint, David Kennington, asking to discuss a possible licensing arrangement. These telephone calls resulted in a trip by Kennington to New York. On January 30 Kennington met with Jacobson in New York City and discussed the possibility of Rebound licensing Matchpoint's device. No agreement was worked out at this meeting, or at any later time. On January 30 Kennington met Monroe in Brooklyn, and discussed the possibility of Tensor becoming a distributor for Matchpoint after the termination of Matchpoint's agreement with its current distributor. No agreement was reached with Tensor at this time or at any later date.

At these meetings Kennington indicated to Jacobson and Monroe that Matchpoint intended to enforce its patent rights.

The contacts of Matchpoint with New York, involving preliminary and inconclusive discussions of possible business arrangements and the assertion of Matchpoint's legal rights in its patent, are not

## OPINION AND ORDER

sufficient to constitute the transacting of business within the meaning of C.P.L.R. § 302(a)(1). See Lehigh Valley Indus., Inc. v. Lehigh Colonial Corp., \_\_\_\_ F.2d \_\_\_\_, Docket No. 75-7301 (2d Cir. November 28, 1975) slip op. 367; Chemical Bank v. World Hockey Ass'n, 403 F. Supp. 1374, 1378-79 (S.D.N.Y. 1975); McKee Elec. Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, 382, 283 N.Y.S.2d 34, 37-38, 229 N.E.2d 604, 607 (1967).

There is authority to the effect that a letter sent into the forum state threatening enforcement of a party's patent rights constitutes the transaction of business, subjecting the party to jurisdiction in a declaratory judgment action. The case arises under the Minnesota long-arm statute. B & J Manufacturing Co. v. Solar Indus., 483 F.2d 594 (8th Cir. 1973). However, in that case, in addition to the sending of the letter, the defendant had other substantial contacts with the forum state. See Rheem Mfg. Co. v. Johnson Heater Corp., 370 F. Supp. 806 (D. Minn. 1974) (long-arm jurisdiction rejected as a violation of due process where contacts with the forum state were not substantial



## OPINION AND ORDER

and where jurisdiction was alleged solely on the basis of a letter informing plaintiff of asserted patent rights).

In any event, I cannot accept the proposition that, under the New York long-arm statute, the mere giving of notice of a possible legal claim under the patent or trademark laws, whether by letter or in person, constitutes the transacting of business.

I turn now to C.P.L.R. § 302(a)(2) dealing with a "tortious act within the state." Plaintiff has the burden on this motion of making a prima facie showing of the tortious act relied upon. Socialist Workers Party v. Attorney General, 375 F. Supp. 318, 322 (S.D.N.Y. 1974); see Lehigh Valley Indus., supra at 824. I hold that there has been no prima facie showing of a tortious act committed by Matchpoint in New York sufficient to serve as a basis for the assertion of personal jurisdiction over Matchpoint. I find no basis for holding that Kennington committed a tortious act in New York when he appeared here on

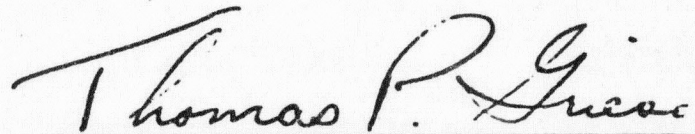
OPINION AND ORDER

January 30, 1975 and discussed possible licensing arrangements with Jacobson, possible distributorship arrangements with Tensor, and made the general statement that he intended to enforce whatever legal rights Matchpoint had.

For the foregoing reasons, the action is dismissed for lack of personal jurisdiction.

So ordered.

Dated: New York, New York  
February 25, 1976

  
THOMAS P. GRIESA  
U.S.D.J.



## United States Court of Appeals for the Second Circuit

Rebound Systems

vs

Mato point industries

State of New York, County of New York, ss.:

Harold dudash  
 agent for Weisman, Celle r Spett, Modlin Wertheimer & Schlesinger  
 for the above named plaintiff-appellant  
 21 years of age, is not a party to the action and resides at 2346 Holland avenue, BX, NY

, being duly sworn deposes and says that he is

the attorney

herein. That he is over

That on the 1st day of June, 1976, 19 , he served the within appendix and brief  
 of plaintiff-appellant

upon the attorneys for the parties and at the addresses as specified below

Jack A. Katz, attorney for the defendnt-appellee, 1423 Davis building, Dallas, Texas

75202

by depositing two copies of the brief and two copies of the appendix  
 to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-  
 tained by the United States Government at  
 90 Church Street, New York, New York  
 directed to the said attorneys for the parties as listed above at the addresses aforementioned,  
 that being the addresses within the state designated by them for that purpose, or the places  
 where they then kept offices between which places there then was and now is a regular com-  
 munication by mail.

Sworn to before me, this 1st

day of June, 1976, 19

*Roland W. Johnson*  
 ROLAND W. JOHNSON,

Notary Public, State of New York  
 No. 4509705

Qualified in Delaware County  
 Commission Expires March 30, 1977